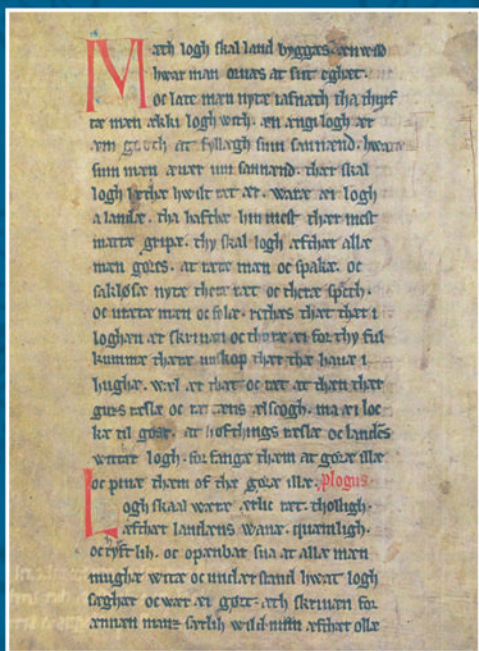


Legal Procedure and Practice in Medieval Denmark

Per Andersen



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VOLUME 11

Legal Procedure and Practice in Medieval Denmark

By

Per Andersen

Translated by

Frederik and Sarah Pedersen



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2011

Cover illustration: 'Mæth logh scal land byggæs' tells the beginning of the preamble to Jyske Lov dating from 1241. The oldest surviving manuscript of Jyske Lov is the Codex Holmiensis C 37 from c. 1276 which has just been returned to Denmark from Kungliga Biblioteket in Stockholm to Det Kongelige Bibliotek in Copenhagen.

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This book is printed on acid-free paper.

Library of Congress Cataloging-in-Publication Data

Andersen, Per, 1969–

Legal procedure and practice in medieval Denmark / by Per Andersen ; translated by Frederik and Sarah Pedersen.

p. cm. — (Medieval law and its practice, 1873-8176 ; v. 11)

Includes bibliographical references and index.

ISBN 978-90-04-20476-8 (hardback : alk. paper) 1. Procedure (Law)—Denmark—History—To 1500. 2. Procedure (Law)—Denmark—History—16th century.

I. Pedersen, Frederik. II. Pedersen, Sarah. III. Title. IV. Series.

KJR287.A528 2011

347.489'5—dc22

2011009021

ISSN 1873-8176

ISBN 978 90 04 20476 8

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ABBREVIATIONS

A&O	Arvebog & Orbodemål (The Book of Inheritance and Heinous Crimes)
Aasum	Aasum Herreds tingbog
ASun	Anders Sunesens Parafrase af Skånske Lov (Anders Sunesen's Paraphrase of the Law of Skåne)
CCD	Corpus Constitutionem Daniæ
Cod.	Codex (Corpus Iuris Civilis)
Comp.	Compilatio (Quinque compilationes antiquae)
Corpus	Corpus Codicum Danicorum Medii Aevi
Da Dom	Danske Domme
DD	Diplomatarium Danicum
DGK	Danmarks gamle Købstadslovgivning
DGL	Danmarks gamle Landskabslove med Kirkelovene
DGLN	Danmarks gamle Love paa Nutidsdansk
Dig.	Digesta (Corpus Iuris Civilis)
DKR	Danske Kancelliregistranter 1535–1550
DMA	Danmarks middelalderlige annaler
DRL 1	Den danske rigslovgivning indtil 1400
DRL 2	Den danske rigslovgivning 1397–1513
DRL 3	Den danske rigslovgivning 1513–1523
ESL	Eriks Sjællandske Lov (Eric's Law for Sjælland)
FFR	Kong Frederik den Førstes danske Registranter
HdR	Handwörterbuch der deutschen Rechtsgeschichte
Helsingør 1	Helsingør stadsbog 1549–1556
Helsingør 2	Helsingør stadsbog 1554–1555, 1559–1560 og 1561–1565
Herlufholm	Herlufholms Birks Tingbog
HT	Historisk Tidsskrift
Inst.	Institutiones (Corpus Iuris Civilis)
JL	Jyske Lov (The Law of Jylland)
Jydske Lov	Jydske Lov (eds. O. Fenger and Chr. R. Jansen)
KB	Kancelliets Brevbøger
Kjærgaard	Kjærgaard Birks tingbøger
KLNM	Kulturhistorisk leksikon for nordisk middelalder
Konst.	Die Konstitutionen Friedrichs II.
Lat.	Laterankoncil

LdM	Lexikon des Mittelalters
Malmø råd	Malmø rådstueprotokoller
Malmø stad	Malmø stadsbog
Malmø ting	Malmø tingbøger
MGH	Monumenta Germaniae Historica
Miss.	Missiver fra Kongerne Christiern I.s og Hans's Tid
NHT	Norsk Historisk Tidsskrift
Nov.	Novellae (Corpus Iuris Civilis)
Rep.	Repertorium diplomaticum regni Danici mediævalis
Saxo	Saxos Danmarks Historie/Saxonis Gesta Danorum
SDKH	Samling af danske Kongers Haandfæstninger
SGDL	Samling af gamle danske Love
SjKl	Sjællandske Kirkelov (The Church Law for Sjælland)
Skast	Skast herreds tingbog
SkKl	Skånske Kirkelov (The Church Law for Skåne)
SkL	Skånske Lov (The Law of Skåne)
Sokkelund	Sokkelund herreds tingbøger
Stege	Stege bys bog
TfR	Tidsskrift for Rettsvitenskap
Thords Art.	Thords Artikler (Thord's Articles)
UGDD	Udvalg af gamle danske Domme
VLD	Viborg Landstings Dombøger
VSD	Vitae Sanctorum Danorum
VSL	Valdemars Sjællandske Lov (Valdemar's Law for Sjælland)
YR	Yngre Redaktion af Valdemars Sjællandske Lov (The Younger Redaction of Valdemar's Law for Sjælland)
ÆR	Ældre Redaktion af Valdemars Sjællandske Lov (The Older Redaction of Valdemar's Law for Sjælland)
X	Liber Extra
ZSR	Zeitschrift der Savigny-Stiftung für Rechtsgeschichte

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KINGS OF DENMARK

Gorm the Old	–958
Harald I Bluetooth	958–986/7
Sweyn I Forkbeard	986/7–1014
Harald II	1014–1018
Canute II the Great	1018–1035
Hardeknud/Canute III	1035–1042
Magnus the Good	1042–1047
Sweyn II Estridsson	1047–1074/6
Harald III Hen	1074/6–1080
Saint Cnut IV	1080–1086
Oluf I Hunger	1086–1095
Eric I the Good	1095–1103
Niels	1104–1134
Eric II Emune	1134–1137
Eric III Lam	1137–1146
Sweyn III Grathe	1146–1157
Canute V	1146–1157
Valdemar I the Great	1154–1182
Canute VI	1182–1202
Valdemar II the Victorious	1202–1241
Eric IV Plovpenning	1241–1250
Abel	1250–1252
Christopher I	1252–1259
Eric V Klipping	1259–1286
Eric VI Menved	1286–1319
Christopher II	1320–1326, 1329–1332
Valdemar III	1326–1329
Interregnum	1332–1340
Valdemar IV Atterdag	1340–1375
Oluf II	1375–1387
Margrethe I	1387–1397 (1412)
Eric VII of Pomerania	1397–1439
Christopher III of Bavaria	1439–1448
Christian I	1448–1481
Hans	1481–1513

Christian II	1513–1523
Frederick I	1523–1533
Inrerregnum	1533–1534
Christian III	1534–1559

INTRODUCTION

There are at least two good reasons to study the development of secular legal procedure in medieval Denmark. Firstly, because it is clear from the Danish sources how the Fourth Lateran Council's prohibition against the participation of clerics in trial by ordeal was implemented in Danish secular law in the years following 1215 and that it required both a fundamental restructuring of legal procedure and an entirely different approach to jurisprudence. Secondly, because secular legal procedure in the Late Middle Ages was conservative and consistently based on procedure that was a consequence of the radical changes of the thirteenth century. While torture, with its background in inquisitorial procedure, was introduced as a commonly permitted instrument to force confessions from otherwise recalcitrant suspects in many places in late medieval Europe,¹ the Danish way was to turn to torture after sentencing—and then only after permission for its use had been granted by the king.

The problems created by the sudden fall from favour of trial by ordeal were solved in Denmark by introducing juries, just as had been done in, for example, England. However, in Denmark, in contrast to England,² they were clearly a new jurisprudential institution whose introduction made it possible for royal power to change large parts of Danish procedural law and refashion it in closer accordance with contemporary learned law: the learned law that was used and developed in ecclesiastical contexts and taught at universities in southern Europe. Over a few decades Danish procedure focused on: securing an evidentially correct summons of the defendant; introducing and enforcing time limits to avoid long-drawn-out litigation; and establishing the truth in a specific matter rather than letting it be decided by formal proof. The first evidence to survive concerning the structure of legal procedure in Denmark dates from the end of the twelfth century,

¹ Robert Bartlett, *Trial by Fire and Ordeal. The Medieval Judicial Ordeal* (Oxford, 1986), pp. 135–143; John H. Langbein, *Torture and the Law of Proof. Europe and England in the Ancien Régime* (Chicago and London, 1977).

² R.C. van Caenegem, *The Birth of the English Common Law* (Cambridge, 2nd ed., 1988), pp. 62–84.

and from this it is clear that procedure was fundamentally accusatory: each party presented proof for their positions. It was still this procedure that was the foundation of Danish legal practice after 1215 but, in accordance with contemporary ecclesiastical norms, the requirements of proof were changed so that it became the duty of the recently introduced juries to examine the positions and proofs in order to find the substantial truth in the case at hand.

These phenomena and developments are not unique to Denmark: they are seen in several places in medieval Europe, although developments in the later Middle Ages seem to be more conservative in Denmark than in most other places. What seems to separate Denmark from many other places is, on the one hand, the thoroughness with which the new norms and reforms were introduced and, on the other, the total absence of learned juristic terminology, which one would have expected in connection with the thirteenth century's extensive change of procedure and jurisprudence. In the Danish sources there are virtually no (immediate) traces of the activities of legally trained personnel acquainted with learned Roman-canonical procedure and its attendant terminology in Denmark or the Danish central administration surrounding the king. This observation was formerly used by Danish legal historians and historians to support the claim that Danish social structure and legal institutions of the Middle Ages were unique in comparison to most of Denmark's European neighbours. The same is the case with regard to legal procedure, which was quoted as evidence of a uniquely Danish (partly Nordic) way of conducting court cases.

This common idea, which has of course also been accepted by international research and is mirrored in its understanding of the development of law in Denmark in the Middle Ages, will hopefully be killed off or, at least a considerably more complex picture will be conveyed, by this study. The starting point for this is a different methodological approach to the Danish sources than has previously been practiced. First of all, I approach the problem of the possible uniqueness of Danish procedure from the 'outside': before reading the Danish sources, I learned how Roman-canonical procedure functioned and developed from the end of the eleventh century onwards. From this starting point, I have tried to guard against the same mistakes made by my predecessors, who seem to have studied Danish procedure without a previous knowledge of the legal procedure that may have formed the model for, or inspired, development in Denmark. Secondly, I have

focused on how procedure functioned in practice: what were the practical steps necessary for raising a case; presenting a summons; clarifying disagreements, etc. By taking this approach, it has been possible to circumvent the fact that the terminology does not indicate that Danish procedure is influenced by learned law.³ Thirdly, I have assumed that Denmark in the Middle Ages was an integrated part of Europe, and that Danish society and the Danish legal system was just one of many variant ways in which society and law could be constructed. This has meant that, from the start, I have regarded the development of Danish law as coterminous with the development of Roman-canonical procedure and other European procedural developments, which has led to new insight and approaches to the Danish sources.

In this regard, it is also interesting to ask whether the reformation of religion that was conducted in 1536 in Denmark immediately impacted on Danish legal procedure. Therefore, this investigation of Danish procedure will reach the year 1558, when post-Reformation legislation was collected together in the royal recess known as *Koldingske Recess*.

Bearing this in mind, it is not only my hope that this study will lead to a new understanding and insight amongst an international audience into the nature of Danish law in the Middle Ages, but also that the investigation into Danish procedure will indicate a new approach to the study of medieval law. An approach in which there is less of a focus on juristic terminology and the difference between learned and secular law and more attention to the ideological inspiration that could be provided by the learned law. The inspiration behind Danish procedure is not immediately evident if we only investigate similarities in terminology. However, the situation is completely different if we study practical jurisprudence and procedure. The way in which the ideology of the learned law was implemented in practice and found its expression in Danish procedure means that the present study will hopefully encompass more than just procedure. It offers a broader understanding of how ideology could penetrate and change jurisprudence without being immediately obvious to those who, possibly because of tradition,

³ If one should wish a more formalistic (but less easy to grasp) approach to the questions concerning proof especially, this is found in Henning Matzen, *Om Bevisreglerne i den ældste danske Proces. Indbydelsesskrift til Københavns Universitets Aarsfest i Anledning af Hans Majestæt Kongens Fødselsdag den 8de April 1893* (Copenhagen, 1893).

social or political reasons, would have opposed an implementation of this nature. Rather than focusing on pure dogmatic, this investigation will also focus on uncovering the ideological character of procedure with regard to how those learned in law and those holding political power thought that—or could agree with other interested parties on how—jurisprudence needed to be constructed in order to ensure that justice was done in medieval Denmark. As a natural extension of this, it is also a good idea to analyse how procedure took place in reality, that is, whether the ideologically motivated procedural rules in the normative legal texts were actually followed in practice. The study of the development of secular procedure in medieval Denmark is thus *both* an analysis of this development and its relationship to contemporary international inspirations and currents of ideas *and* a contribution to the development of a new angle on the study of medieval legal history.

While learned procedure has been subject to several small but detailed and in-depth treatments concerned with uncovering and situating in time different developmental steps that took place in the High Middle Ages, that is the twelfth and thirteenth centuries, the study of individual ‘national’ legal systems and their attendant procedure has been in short supply. The studies that do exist are usually part of older but comparatively in-depth studies of the legal history of individual kingdoms: studies where legal procedure is just a minor part. The explanation of this must lie in the common European tradition that may have seen procedure as an important part of individual legal traditions, but also regarded it as relatively simple and transparent in relation to whether it used learned terminology: if it did, it was assumed that it imitated Roman-canonical procedure and, if it did not, it was assumed that it mirrored a local, unique way of constructing law and legal systems—or an old ‘Germanic’ or ‘Nordic’ way. For the same reason, legal historians have generally not spent much effort on analyses of procedure in individual legal systems.

In the introductory part, I will prepare the reader for the investigation of Danish legal procedure and its development in the Middle Ages. This will be done first and foremost in chapter 1 by providing a historical introduction to twelfth and thirteenth century Denmark, focusing on its geographical extent and administrative structure and the political, social and legal situation during the period when the Danish provincial laws were written down. In chapter 2 I shall present a historiographical explanation of why what we think we know

about medieval Denmark and its legal history in particular can appear to be out of date. After that, in chapter 3, I shall give a short summary of the state of learned law in the second half of the twelfth century and its development to the middle of the thirteenth century, that is, during the period when Roman-canonical procedure was developed as a part of a common European approach to law, as a part of the *ius commune*.

After this introduction, we shall proceed to the investigation proper. This falls into two parts—a consequence of the impossibility of gaining an overall view of Danish law, with its separate laws for separate jurisdictions and separate legal institutions.

In the first part, I have chosen to focus on the procedure and the legal institutions that are mentioned and regulated by the provincial laws. The first part will therefore conclude at the end of the thirteenth century, when the medieval provincial laws, by and large, had reached their final written form. These were the laws that provided the larger part of the foundations of Danish legal procedure in its many forms until 1683 when the royal administration finally succeeded in compiling a unified law for the entire nation, that is *Danske Lov*. Thus it was only in 1683 that Denmark saw the introduction of a unified law.

The legal institutions and jurisdictions that are mentioned in the provincial laws are the fundamental ones: *landsting* and *herredsting* (roughly equivalent to provincial and district courts). These are, so to speak, the foundations and the spine of Danish jurisprudence in the period under investigation. Therefore, it is also necessary to pay great attention specifically to these institutions and the rules of the provincial laws regarding them. In order to make this as simple as possible, I have therefore chosen, in the first part of the study, to draw a distinction between the jurisprudential institutions—that is those with sentencing and executive functions—and procedural law. While I draw a distinction between the jurisprudential institutions found at the provincial courts and the district courts I shall examine procedural law in the two institutions as one. The reason for this is that procedural law and its development in the district courts and the provincial courts are identical. Of course this does not mean that there are no differences between the two institutions, but the provincial laws simply do not distinguish between procedures at the two types of courts. In contrast, I shall draw such a distinction for each province according to its provincial law because there are so many chronological and apparent geographical differences that there are significant differences

in the procedural law, which was the foundation for or established by the individual legal compilations in each province.

This means that chapter 4 is devoted to an account of the sources themselves: the Danish provincial laws, their dating and their evolution. In chapter 5 I shall treat the jurisprudential institutions with, respectively, sentencing and executive functions, as they appear in the provincial laws and other contemporary sources. Finally, in chapter 6 I shall analyse the normative rules for procedure as they are expressed in the provincial laws. I shall then draw brief conclusions to end part one.

In the second part, which covers the chronological period c. 1300 to 1558, I shall follow the development of both the jurisprudential institutions and procedure. This of course will cover both *landsting* and *herredsting*, but now the investigation will also extend to the *birketing* (roughly equivalent to peculiar courts known from England), *byting/rådstueretten* (the two types of court in the boroughs) and the royal court of law (*kongens retterting*). These jurisdictional institutions and geographical areas and their attendant procedure begin to be more thoroughly described in the sources after 1300 and the sources now also begin to include some descriptions of legal practice. The later part of the period is characterised by an attempt by the central powers to homogenise both the jurisprudential institutions and their procedure through the passage of specific laws and administrative practices. I am therefore abandoning the geographical division that was a feature of part one and shall divide the investigation into treatments of the aforementioned institutions. In other words, the jurisprudential institutions and the procedure at the *landsting*, *herredsting*, *birketing*, *byting/rådstueretten* and *kongens retterting* will be treated individually.

This means that chapter 7 outlines the main features of the political, social and legal development during the approximate period 1300 to 1558 and the sources included in this part of the investigation. In chapter 8 I shall analyse the development of the jurisprudential institutions and procedural law at the *herredsting* since this was the first legal institution to which Danes turned for the enforcement of their rights. In chapter 9 I shall treat the development of the jurisprudential institutions and the procedural law used by *landstinget* and this is repeated in chapters 10, 11 and 12 for the *birketing*, *byting/rådstueretten* and *kongens retterting*. A short conclusion will end the second part.

In a final chapter, I shall summarise my conclusions concerning overall developments and contrast these to common European developments.

It is my aim to analyse the development of Danish procedural law from a practice-oriented perspective from its earliest appearance to the Koldingske Recess of 1558. This means that I shall focus on how basic procedure has progressed and developed in individual legal institutions rather than getting lost in detailed and rarely rewarding discussions about every facet of the different jurisdictions' and institutions' procedural powers and demands for evidence, and so on. Such an approach can very well mean that some details are lost in order to see the bigger picture, but this approach has been chosen consciously in the hope that it will give a more readable and therefore more understandable overview of the development of Danish procedural law in the Middle Ages.

The present monograph has been written and translated with generous financial help from the Augustinus Foundation, the Knud Højgaard Foundation, the Faculty of Social Sciences at the University of Aarhus, Aarhus University Research Foundation, Politiken Foundation, and the Ernst Andersen and Tove Dobel Andersen Foundation. I also owe Ditlev Tamm, Helle Vogt and—especially—Michael H. Gelting a large thank you for reading and commenting on large parts of the manuscript. Any errors or omissions are thus only the fault of the author. Finally, I would like to thank Frederik and Sarah Pedersen for the good job they have done in translating the Danish manuscript into English. As a result of their questions, suggestions and comments, I have made more than a handful modifications and clarifications of the original text—a good translation improves a text, and I feel that is certainly true in this case.

Aarhus January 2011

INTRODUCTION

MEDIEVAL DENMARK—PART OF EUROPE

CHAPTER ONE

MEDIEVAL DENMARK

The first mention of legal procedure in the secular sphere in the vernacular Danish can be found in the so-called 'landskabslove' (provincial laws), the name of which refers to the *lande*, that is the regions or provinces that had a regional *ting*. The provincial laws were written down in the period of Danish history known as the 'time of the Valdemars' after the kings Valdemar I the Great (r. 1154–1182) and his two sons Canute VI (r. 1182–1202) and Valdemar II the Victorious (r. 1202–1241). These comprehensive legal collections contain a large number of rules concerning inheritance, manslaughter, malicious damage, theft, violence and property. With their many concerns, these provincial laws are thus not only good historical sources of information about the basic normative expectations and concepts of what was law in the Middle Ages, but also about contemporary social structure. However, it is not social structure that is of interest here but the laws' basic normative expectations and concepts of how to decide what is right. Before I go so far, however, it is necessary to provide the international reader with a general outline of the context of the laws. Therefore this chapter will provide a brief introduction to Danish history and social structure in the Middle Ages and to the geographical boundaries of my investigation and the different institutions of legal administration.

Denmark's Political History until c.1300

It remains unclear whether there were laws in the modern sense of the word at the time of the Valdemars. Both the Roskilde Chronicle, composed around 1138, and the chronicler Saxo writing around 1200 mention early legislation from the time of the legendary king Frode Fredegod (who was said to have ruled around the time of Christ) and the kings Sweyn I Forkbeard (r. 988–1014), Canute II the Great (r. 1018–1035) and Harald III Hen (r. 1074–1080), but it is not possible to ascertain whether these laws existed or what form or content they had from these sources. However, there is no doubt that some form of

fixed law existed in early medieval Denmark and we know that some kings gave laws in individual legal regions in the twelfth century.¹ The oldest source that we have for fixed law does not, however, deal with royal law. Instead it comes from Ælnoth, a monk resident in Odense, who composed a *Vita* of St Canute (r. 1080–1086) around 1120. In this work Ælnoth says about the diocesan city of Viborg

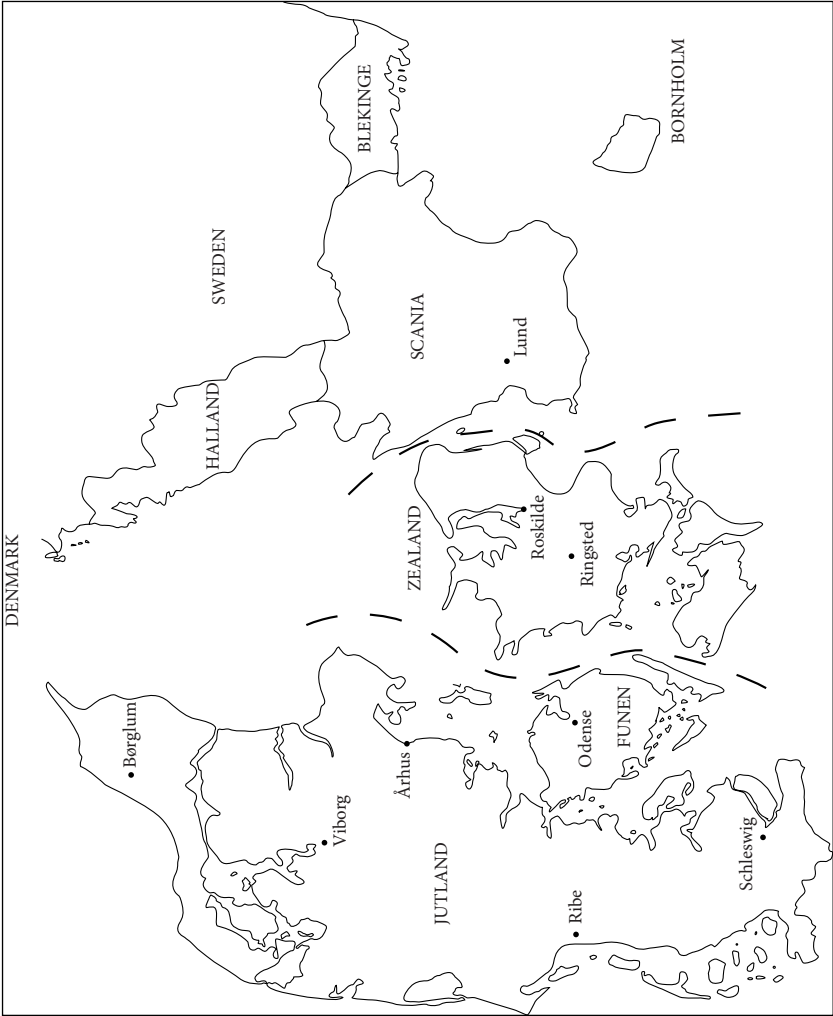
... [in] the archiepiscopal city of Viborg a large crowd often gathered for a *ting* from all parts of Jylland, both to negotiate common affairs and to discuss the justice of the laws, their continued validity and to confirm them. And what was determined by common consent of the congregated mass of people cannot be set aside without punishment anywhere in the parts of the country of Jylland.²

However, Ælnoth does not make us much wiser about the condition of law in Jylland because he provides no information about which areas the law regulated, although we may surmise that the law dealt with *leding* (muster) and other military matters since the revolt which resulted in King Canute's death was initially about these issues.

Overall, we do not know much about Denmark before the revolt against and martyrdom of Canute in 1086. Foreign chronicles from before 1000 AD give the impression that political structures in the area that was later to be called Denmark were based on aggressive warlords in charge of aristocratic clans or interest groups going abroad to plunder coastlines all over Europe if they could not consolidate their power at home. By going abroad, these warlords achieved the riches that they could not find in their own country. Subsequently, as economic structures became more established and power was centralised abroad, it became more difficult for warlords to be successful in their plunder, for which reason the major warlords turned their attention to local areas in Denmark and started a more effective exploitation than before to compensate for their lost income from plunder. To be successful in this endeavour it was not only necessary to be a territorially dominant magnate but also to possess the expertise to organise society in such

¹ See Ludvig Holberg, *Dansk og fremmed Ret. Retshistoriske Afhandlinger* (Copenhagen, 1891), pp. 193–194; Aksel E. Christensen, *Kongemagt og Aristokrati. Epoker i middealderlig dansk Statsopfattelse indtil Unionstiden* (Copenhagen, 1968), pp. 24–26.

² *Vitae Sanctorum Danorum*, 2 vol. [hereafter VSD], ed. M.Cl. Gertz (Copenhagen, 1908), vol. 1, p. 111: "... ubi ex totis lucie partibus quamsepius non minima multitudo tam de causis communibus tractatura quam et de legum ueritate siue firmitate discutienda simul et stabilienda, conuenit; et quod ibi communi consensu aggregate multitudinis statutum fuerit, non impune uspiam in lucie partibus irritum fieri ualebit."



Map 1. The Medieval Kingdom of Denmark.

a way that the magnate could refine the exploitation of resources to its furthest degree. This was the reason why foreign know-how, which was offered primarily by clerics, was welcomed in the eleventh century. Although this development resulted in an accelerating consolidation of the realm, most significantly during the reign of Sweyn II Estridsson (r. 1047–1074/76), it is clear from the chronicler Adam of Bremen—who is one of the most important sources for Danish history before the twelfth century—that the Danes could be divided into several peoples.³ In terms of law, this is reflected in the fact that Ælnoth mentions how law was discussed at the *ting* in Viborg. In reality this also meant that although the king was an important ruler, he could not exercise his sovereignty over all of Denmark—the realm was controlled by a complicated network of alliances consisting of magnates who were in constant competition over territory, resources and positions of power.⁴

When Sweyn Estridsson died five of his seven sons succeeded him in order, having been elected by the populace. Among them was Harald III Hen who, according to Saxo, gave laws, and the above-mentioned St Canute who was killed in front of the altar of St. Alban's Church in Odense on the island of Fyn by mob protesting against the taxes he had imposed on the people after an aborted invasion of England in 1086. The son of Sweyn Estridsson who reigned for the longest amount of time was Niels (r. 1104–34), who was elected king when his brother Eric Ejegod (r. 1095–1103) died in Cyprus on a pilgrimage to the Holy Land. Niels and his son Magnus saw Eric's son Canute, who had been appointed Earl over the Southern part of the realm with the honorific name of *Lavard* (Lord), as a threat to their plans for Magnus to succeed his father. Therefore Magnus engineered the murder of Canute Lavard and this murder became the starting-point of several years of civil war between Niels and Magnus on one side and Eric Emune, Canute Lavard's half-brother, on the other side. Even when Eric and his supporters succeeded in defeating Niels and Magnus in 1134, confusion continued over who was the rightful king

³ The date has been debated since Johannes C.H.R. Steenstrup, "Svend Estridsen", ed. C.F. Bricka, *Dansk Biografisk Leksikon*, 19 vol. (Copenhagen, 1st ed., 1887–1905), vol. 17, pp. 3–5, and Erik Arup, "Kong Svend 2.s Biografi", *Scandia* 4 (1931), pp. 55–101. Thank you to Michael H. Gelting who pointed these studies out to me.

⁴ For a more thorough treatment of the period, see Nils Hybel and Bjørn Poulsen, *The Danish Resources c. 1000–1550. Growth and Recession* (The Northern World 34) (Leiden, 2007), pp. xvi–xix.

and although there were periods of peace the Danish realm continued to be racked by civil war until 1157 when Canute Lavard's son, Valdemar, managed to secure the kingdom for himself.⁵

Despite skirmishes and occasional attempts at revolt led by other members of the royal family, Valdemar I and his sons created comparatively stable conditions for the realm and its outward expansion. For this reason the time of the Valdemars is usually considered a time of growth and greatness by Danish historians. Valdemar I the Great and his sons' success was due in no small measure to the support they received from powerful magnates such as the members of the so-called 'White' (Hvide) family and a good relationship with the men of the Church. In the first decades of their reign, this relationship suffered from the fact that Archbishop Eskil of Lund (r. 1137–1177) disapproved of Valdemar's support of Emperor Frederick Barbarossa's candidate for the papacy during the papal schism. When he ascended the throne after the Danish civil war of 1157 King Valdemar's position was far from secure. For this reason he sought to shore up his position with support from Frederick Barbarossa. Therefore the Danish king supported the Emperor when Barbarossa produced a series of anti-popes beginning with Victor IV in 1159. Though the papal schism continued to 1180, Valdemar felt strong enough to re-align his kingdom with Rome by the time of the death of Pascal III in 1168 which also ended the conflict between the king and the Archbishop. 1170 saw Eskil return as the head of the Danish church to preside over two important events in as many days: the translation of St Canute Lavard and the coronation as co-regent of his grandson, Valdemar's own son, Canute VI in St Benedict's church in Ringsted on the island of Sjælland. There can be no doubt that this double ceremony, which is known in Danish historiography as the 'Church Feast in Ringsted', was of the utmost importance for Valdemar the Great since this event confirmed that his dynasty originated from a saint and consolidated his son's claim to the throne.⁶

⁵ Jf. Lars Hermanson, *Släkt, vänner och makt. En studie av elitens politiska kultur i 1100-talets Danmark* (Avhandlingar från Historiska institutionen i Göteborg 24) (Göteborg, 2000), pp. 51–186.

⁶ Jf. Hermanson, *Släkt, vänner och makt*, pp. 187–250. For a discussion and analysis of the relations between archbishop Eskil of Lund and the many candidates for the crown of the Danish kingdom, see Carsten Breengaard, *Muren om Israels hus* (Copenhagen, 1982), pp. 224–319.

The events in Ringsted are not the only reason why the year 1170 was so important. In its entry for this year, the Annals of Ryd inform us that “leges Danorum edite sunt”,⁷ “the laws of the Danes were published”. This is a very important piece of information since it indicates that there was an attempt to produce laws to cover the entire country because *Danorum* cannot be interpreted in any other way. If the laws were to cover a single province, the annals would have informed us that the laws of the Jyder or the Sjællandere had been published. However, the movement towards a national set of laws was, as we will see in Chapter 4, abandoned during the time of the Valdemars, undoubtedly because the idea fell on stony ground amongst the people who, as mentioned by Ælnoth, congregated in regional *ting* and influenced the formulation of valid law.

Canute VI was succeeded by his brother Valdemar II the Victorious in 1202 and the latter died in 1241. His death marks the transition between the relatively peaceful interior politics that characterised the reigns of the Valdemars and the turbulent times that were to follow under the rule of Valdemar II's sons. Valdemar II was succeeded by his son Eric, to whom later generations gave the unflattering epithet ‘Plovpenning’ (‘Ploughpenny’), meaning ‘the one who taxes ploughs’. Eric's two younger brothers, however, were not satisfied with their titles as Dukes of Southern Jylland and Lolland and their dissatisfaction resulted in revolts and disturbances. Despite this, Eric succeeded in holding on to power and presumably also in developing the provincial laws that had first been formulated during the reign of his father. However, Eric's reign ended suddenly on 9 August 1250 when he was murdered by followers of his brother Abel. Abel (r. 1250–1252) succeeded Eric, but before ascending the throne he had to swear with the aid of oath-helpers that he had not been involved in the murder of the king. However, Abel, too, did not reign for long. He died in 1252 campaigning against rebels on the borders with Germany. His death made it possible for his brother Christopher to become king (r. 1252–1259) and thus all Valdemar II's legitimate sons ascended the Danish throne. Both King Abel and King Christopher I tried to follow their father's and brother Eric's example as law-givers, which resulted in the text known as the *Abel–Christopher Decree*, which primarily dealt

⁷ *Danmarks middelalderlige annaler*, ed. Erik Kroman (Copenhagen, 1980) [hereafter DMA], p. 166.

with crimes against the king.⁸ However, the decree most probably was (and remained) a never-promulgated draft as it appears to have lacked support amongst the magnates.

In reality, it seems that Abel and Christopher did not have the power to legislate. Christopher's son, Eric Klipping (r. 1259–1286) appears to have achieved this, but in the latter years of his reign he was forced to follow the stipulations of a charter (known in Danish as a *håndfæstning*) he had been forced to sign in 1282 according to which those laws that had been composed during the reign of his grandfather Valdemar II were to be followed (thus they are called 'King Valdemar's Laws').⁹ The background for the king's political defeat is undoubtedly to be found in the fact that by 1282 powerful groups among the secular and ecclesiastical aristocracy had gained sufficient strength to oppose the strengthening of royal power that was gradually being imposed.¹⁰

⁸ The statute increased the number of punishable offences against the king and granted increased powers of imprisonment of suspected criminals to royal officials. For a discussion of the nature of the decree, see Per Andersen, *Rex imperator in regno suo. Dansk kongemagt og rigsløvgivning i 1200-tallets Europa* (Odense, 2005), pp. 111–117.

⁹ For the *håndfæstning* of 1282, see *Diplomatarium Danicum*, 4 series, 36 vol. (Copenhagen, 1938–2000) [hereafter DD], 2:3:45. The published volumes cover the period until 1400, but the project is now continued electronically, see <http://diplomatarium.dk/> A Danish translation is found in the analogous *Danmarks Riges Breve*.

A *håndfæstning* (*Handfeste* in German) was the term used for a special kind of documents issued from the thirteenth to the seventeenth century in Scandinavia and Germany by kings. In many ways it is a Scandinavian parallel to the English Magna Carta and it is not unlikely that it has been inspired by the latter. The *håndfæstning* was the result of the strength of the power of the nobility. In Denmark it was used as a regular coronation charter for the first time in 1320, and between 1440 and 1648 it was a normal condition for the recognition of a new king. There was no permanent charter to sign; every new king had to accept a new one that applied to his own reign. On the other hand all *håndfæstninger* were based on the same model: The king had to promise that he would rule as a just king; that he would co-operate with the nobility; that he would never imprison any free man; that all leading offices would be filled only by noblemen; and that questions of war and peace depended on the acceptance of the nobility.

¹⁰ Concerning the problematic relations between the archbishops of Lund and the Danish kings and internal dissension in the Danish Church see Niels Skyum-Nielsen, *Kirkekampen i Danmark 1241–1290* (Copenhagen, 1963). For a closer analysis of the men behind the *håndfæstning*, see Andersen, *Rex imperator in regno suo*, pp. 139–145.

Social Structures in the Time of the Provincial Laws

The fact that the political situation in 1282 was dramatically different from that of the time of the Valdemars is undoubtedly a consequence of social changes that occurred in Danish society during a relatively brief period around the middle of the thirteenth century. The provincial laws aimed primarily to regulate legal conflict and the problems that were significant for landowners—that is, for men, since women mostly needed a legal representative to act on their behalf. Landowners were, however, not a homogenous group of people even though they all shared the same legal rights according to the laws. Roughly speaking, we can divide landowners—or full freemen—into two groups: magnates and ‘lesser farmers’ (i.e. less than the magnates).

The *magnates* were those men who possessed economic, political and social power through their lands, privileges or other factors and through these could influence decisions both locally and regionally, and in some cases even for the entire kingdom. These were the men, who appeared as witnesses in royal charters and are mentioned in contemporary chronicles, and they were often closely associated with the king through friendship or as foster-brothers—or they were in opposition to the king when they were excluded from his inner circle. In terms of numbers, they were relatively few, probably a couple of percent of the population.¹¹ Medieval magnates served the same function as the warlords of the Early Middle Ages and, in particular from the beginning of the thirteenth century, they were the backbone of the king’s offensive army.¹² The magnates, or the magnates’ families, were also those who had the financial resources to establish extensive estates and to own many manors.¹³ But they still must not be thought of as a homogenous group in which every member worked to realise a common goal. For that, their position and interests were too different and,

¹¹ For the same estimate concerning the English nobility, see Chris Given-Wilson, *The English Nobility in the Late Middle Ages* (London and New York, 1987), pp. 13–15. I owe Frederik Pedersen thanks for drawing my attention to this work.

¹² See Michael H. Gelting, “The Problem of Danish ‘Feudalism’: Military, Legal and Social Change in the Twelfth and Thirteenth Centuries”, eds. Sverre Bagge, Michael H. Gelting and Thomas Lindkvist, *Feudalism: New Landscapes of Debate* (The Medieval Countryside 5) (Turnhout, to be published); Niels Lund, *Lið, Leding og Landeværn: Hær og samfund i Danmark i ældre middelalder* (Roskilde, 1996), pp. 225–244.

¹³ Erik Ulsig, *Danske adelsgodser i middelalderen* (Skrifter udgivet af det Historiske Institut ved Københavns Universitet 2) (Copenhagen, 1968), pp. 19–46, 117–124; Nils Hybel and Bjørn Poulsen, *The Danish Resources*, pp. 165–175.

for example, dependent on whether they had a good relationship with the reigning monarch.

We also find the ecclesiastical aristocracy amongst the magnates. By far the major part of bishops and abbots were recruited from among the magnates and thus to a large extent they shared their culture and outlook on life. Often, such ecclesiastical magnates occupied powerful offices in the secular administration because of their schooling, for example as 'leader of the royal chancery', an office which developed in the middle of the thirteenth century. Thus these ecclesiastical magnates found themselves with a triple loyalty since they had to be loyal to the Church and to the king while maintaining a close connection to their magnate family or kin.

A synonym that is often used to describe the magnates as a group is *adel* (nobility). This is, however, a problematic concept since *adel* implies a delineated group that through inborn privileges possess a special status and a common knowledge of their estate and common goals. This was not the case at the time of the provincial laws and the concept of *adel* only really becomes important in the Late Middle Ages and Early Renaissance, for which reason it is not a particularly useful concept for an analysis of medieval Danish society.¹⁴

The *bønder* ('lesser farmers') were society's backbone.¹⁵ This was a function they served not because of their numbers but because of their public role. The basic meaning of *bonde* is simply a person who lived on his own land and could not be evicted from it unless he lost his property. These farmers, who were 'lesser' than the magnates, were thus such wealthy owners of land that they had enough economic power to participate in public life and in public *ting* and were therefore often known as 'three-marks men' since three marks was the economic-social boundary that marked whether a man could pay the most common fine and thus receive his legal status back in case he lost a suit.¹⁶ Thus they were legally speaking full citizens since this was the economic limit that made it possible to prosecute (and lose)

¹⁴ Jf. Hermanson, *Släkt, vänner och makt*, pp. 7–28.

¹⁵ Anders Bøgh, "Bundones Regis", eds. Agnes S. Arnórsdóttir, Per Ingesman and Bjørn Poulsen, *Konge, kirke og samfund. De to øvrighedsmagter i dansk senmiddelalder* (Aarhus, 2007), pp. 117–149, esp. 139.

¹⁶ Ole Fenger, "Tremarksmanden", eds. Aage Andersen, Per Ingesman and Erik Ulsig, *Festskrift til Troels Dahlerup på tresårsdagen* (Aarhus, 1985), pp. 243–256.

a case without suffering lasting consequences for the suitors' legal or social status.

Technically and legally, magnates were also farmers and are not mentioned separately in the provincial laws. However, the magnates were so rich and powerful that they constituted a special group, for which reason they undoubtedly from time to time functioned as patrons for ordinary/lesser farmers with property the approximate size of a *bol* (roughly equivalent to the Frankish *mansus*).¹⁷ But the distinction was often fluid and, in the final analysis, more concerned with prestige and social power than economic criteria. The difference could often be found in the fact that the magnates' position was founded on factors other than legal rights, for example in connection with warfare. While it was the magnates who participated in and provided men for the king's offensive army, it was initially the lesser farmers who had to provide the naval defences that protected the kingdom against foreign incursions, though this duty was replaced in the thirteenth century by taxation as a result of a transition in military outlook from naval defences to land-based warfare.¹⁸

However, the concept of lesser farmers did not cover everyone who cultivated land, only those who owned the land on which they lived.

¹⁷ Bjørn Poulsen, "Middelalderens fødsel. Tiden 1000–1340—samfund og mennesker", eds. Per Ethelberg, Nis Hardt, Bjørn Poulsen and Anne Birgitte Sørensen, *Det sønderjyske landbrugs historie: jernalder, vikingetid og middelalder* (Skrifter udgivet af Historisk Samfund for Sønderjylland 82) (Haderslev, 2003), pp. 375–433, esp. 428–432. Thank you to Michael H. Gelting who pointed these studies out to me. See also D. Hägermann and A. Hedwig, "Hufe", *Lexicon des Mittelalters*, 9 vol. [hereafter LdM] (München, 1977–1998), vol. 5, col. 154–156.

It is worth noting that all medieval Scandinavian laws distinguish between movables and real estate, i.e. land, a distinction that is not made in Roman law (but known in English law too, see Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, 2 vol. (Cambridge, 2nd ed., 1968), vol. 2, p. 2). The medieval Scandinavian concept of property is more concrete and in some ways more diffuse. It is based on *possession*: in other words the person who was in possession was taken to be the one who was entitled to the good or usufruct in question, see Ole Fenger, Bodil Møller Knudsen and Helle Reinholdt, *'I være have'—om ret til hus og jord i middelalderen* (Aarhus, 1982). This did not mean that the owner could not let others live on or cultivate the land. This assumption is also known in Roman law as 'possessor ergo dominus' or from English law as 'possession is nine tenths of the law'.

¹⁸ Erik Ulsig, "Landboer og bryder, skat og landgilde. De danske fæstebønder og deres afgifter i det 12. og 13. århundrede", eds. Karsten Fledelius, Niels Lund and Herluf Nielsen, *Middelalder, metode og medier. Festskrift til Niels Skyum-Nielsen på 60-årsdagen* (Copenhagen, 1981), pp. 137–165; Gelting, "The Problem of Danish 'Feudalism'".

The landless attracted a number of names, of which the most frequently used were *landbo* (in Latin *colonus*) or *bryde* (in Latin *villicus*). While the *bryde* was a person who managed a farm for someone else or who might even be a partner in that farm, the *landbo* was not necessarily a resident of one farm because he could also make a living by working other people's fields, later on even as a serf.¹⁹ Here one must distinguish between the legal concept of ownership, i.e. land or property belonging to oneself, and usufruct which is the legal right of using and enjoying the fruits or profits of something belonging to another.

The provincial laws demonstrate that *landboer* and *bryder* faced certain restrictions in the administration of justice, despite the fact that they may have been free men—in contrast to the lesser farmers, *landboer* and *bryder* did not possess enough property to function as three-mark men, i.e. as legal subjects, and therefore they could only litigate if they or their families were the victims of violence.²⁰ In all other cases, they were represented by the lesser farmer/owner of the land. The relationship between a *landbo* or *bryde* and his farmer thus appears on the surface to have functioned as a purely contractual relationship, but there were also ties that were not regulated by law. The lease-holder's relationship with the land-owning farmer/magnate was most likely a client-patron relationship in which the magnate supplied work and protection to the lease-holder in return for their fealty. Since the legal system to a very large extent was founded on kin-groups helping members in situations of crises, the patronage of a magnate was

¹⁹ Thomas Riis, "Villici og coloni indtil 1340. Et forsøg på en begrebsanalyse", ed. Svend Gissel, *Landbohistoriske studier tilegnede Fridlev Skrubbeltrang på halvfjerdsårsdagen* (Kerteminde, 1970), pp. 1–20.

²⁰ The same happened to those who entered a contract of *fledføring*. This was the legal term for an institution, where a person either because of old age, illness or other factors was not able to support himself. The intending *fledføring* had to perform a formal legal action at the local court in which he offered himself and all his property to his heirs, who in return would offer him food and shelter. The institution had not only substantial consequences but also changed the legal status of the *fledføring* who lost his personal rights to become the ward of his heirs. It was both a kind of eldercare and a protection of the interests of the heirs who could lose their inheritance according to the new rules on inheritance introduced in Denmark around 1170, see Helle Vogt, "'Fledføring'—Eldercare and the Protection of the Interests of Heirs in Danish Medieval Laws", *The Legal History Review* 76 (2008), pp. 273–281, and Frederik Pedersen, "The Fællig and the Family: The Understanding of the Family in Danish Medieval Law", *Continuity and Change* 7 (1992), pp. 1–12, and the more detailed discussion of Icelandic rules in Frederik Pedersen, "A Medieval Welfare State? Welfare Provision in a Twelfth-Century Icelandic Law Code", *Northern Studies: The Journal of the Scottish Society for Northern Studies* 34 (1999), pp. 89–111.

probably attractive for those less well-endowed whose relations were not able to offer protection.

Just as we have seen in the case of the magnates or the lesser farmers, the landless cannot be seen as a homogenous group since there was great social stratification even amongst them. There were rich lesser farmer landowners who owned several manors within which a *bryde* might not necessarily be poor since it was far more lucrative to look after a large farm than to independently own a small one in an area of poor agricultural land. Therefore the most important distinction between landowners and the landless was a legal one.²¹

Amongst the cultivators of the earth in the Early Middle Ages we must also mention thralls/slaves, who made up the bottom layer of society and whose legal rights were very limited since they were subject to their masters and therefore only had the right to oppose insults and attacks that affected their immediate circle. Thralls (*servus* in Latin) are only mentioned sporadically in Nordic laws,²² but a chapter on responsibility for the actions of thralls was added to the later redaction of the provincial law known as Valdemar's Law for Sjælland from around 1240 giving witness to the fact that, at this time at least, it was considered necessary to provide clear rules for the crimes of thralls.²³

Even though the research of the last couple of decades has shown that there was not one normative feudal system that provided the foundation for medieval society's organisation and hierarchy,²⁴ Denmark nevertheless must have displayed some structures that were different from the rest of contemporary Europe. The special Danish manifestation of a feudal society was, according to Michael H. Gelting, a result of conscious political decisions made by kings Canute VI and Valdemar II

²¹ For similar conclusions concerning England, see J. Ambrose Raftis, *Tenure and Mobility: Studies in the Social History of the Medieval English Village* (Toronto, 1964); Edwin Brezette DeWindt, *Land and People in Holywell-cum-Needingworth* (Toronto, 1972); Anne DeWindt, "Peasant Power Structures in Fourteenth-Century King's Rip-ton", *Medieval Studies* 38 (1976), pp. 236–267. Thank you to Frederik Pedersen who pointed these studies out to me.

²² Ruth Mazo Karras, *Slavery and Society in Medieval Scandinavia* (New Haven and London, 1988), pp. 96–121. Thank you to Frederik Pedersen who pointed this study out to me. See the same, pp. 5–12, 36–69, for a definition of the *servus* as a social category.

²³ See Per Andersen, *Lærd ret og verdslig lovgivning. Retlig kommunikation og udvikling i middelalderens Danmark* (Copenhagen, 2006), p. 141.

²⁴ Susan Reynolds, *Fiefs and Vassals. The Medieval Evidence Reinterpreted* (Oxford, 1994).

at the end of the twelfth and beginning of the thirteenth centuries as a reaction to external and internal changes that threatened social stability.²⁵ The external threat was the increased use of mounted knights in Europe. Until this time Denmark had faced threats mainly consisting of naval incursions along the Danish coasts, which were met with a defensive naval muster, but with the change in threat Canute VI and Valdemar II chose to change their defensive focus from sea to land, which demanded new kinds of equipment and skills. This meant that the old farmer class, which had provided the bulk of the *leding* (the naval defence), was increasingly marginalised in the thirteenth century in terms of military significance and thus in real terms lost influence in comparison to aristocratic knights who had the equipment and skills sought by the kings.

Internal change came in the form of modifications to the rules of inheritance that took place around 1170 and which provided a fixed pattern of distribution of inheritance on the death of the *husbonde* (head of the household).²⁶ Previously, lesser farmers may have had the possibility of allowing the oldest son to inherit all of the family lands, thus preventing the division of estates into too many small parcels that were not viable. The new rules threatened the very existence of the farmer property which was now either to be divided amongst the survivors according to fixed rules or the son who took over the farmland was burdened with heavy payments to his relatives in return for maintaining an undivided estate.²⁷ The new rules challenged the previous social equilibrium and in particular the existence of the landowning lesser farmers, and in many cases they were forced to subject themselves to magnates in order to secure their survival. In addition, farmer agriculture and husbandry had traditionally been based on a significant number of thralls, a group that dwindled significantly during the reigns of Canute VI and Valdemar II. This decline in numbers

²⁵ See Gelting, "The Problem of Danish 'Feudalism'".

²⁶ On the importance of this law, see Michael H. Gelting, "Pope Alexander III and Danish Law of Inheritance", eds. Ditlev Tamm and Helle Vogt, *How Nordic are the Nordic Medieval Laws?* (Copenhagen, 2005), pp. 86–115. A re-visited edition of this volume is going to be published in 2011 in the series Proceedings from the Carlsberg Academy Conferences on Medieval Legal History (Copenhagen).

²⁷ Michael H. Gelting, "Indivisible Farms under Partible Inheritance: The Logic of *Lovbydelse* under the *Skyldeje* System", eds. Tore Iversen and John Ragnar Myking, *Land, Lords and Peasants: Peasants' right to control land in the Middle Ages and the Early Modern Period—Norway, Scandinavia and the Alpine Region* (Trondheim Studies in History 52) (Trondheim, 2005), pp. 229–237.

was a consequence of the fact that it became increasingly difficult to reach those geographical areas where it was possible to acquire thralls, i.e. to capture slaves. A Christian could not hold another Christian in servitude, and since Christendom had spread so far it was necessary to travel ever-increasing distances to meet peoples who were not co-religionists.

Taken together, this meant that increasing numbers of lesser farmers submitted themselves to magnates during the thirteenth century. In other words, power was concentrated in fewer hands and an increasing group of lesser farmers submitted themselves to magnates.²⁸ This development was further accelerated by the fact that taxes that had been based on specific numbers of people were changed at the beginning of the thirteenth century to be based on the estate. In other words, small estates were taxed more heavily.²⁹ Hence the meaning of the word *herremand*, which the provincial law known as *Jyske Lov* (The Law of Jylland) uses to designate a *herres mand*—a lord's man—changed around 1300 to signify a person of comparatively high status, that is a man who was the lord (*herre*) over others.³⁰

Developments after 1300

The first clear signs of the relations of power based on the new social reality can be found in King Eric Klipping's *Håndfæstning* of 1282, which reflects an increasing awareness of hierarchy amongst ecclesiastics, knights, citizens and lesser farmers.³¹ However, it was not until the fourteenth century, and in particular the latter half of that century, that we find well-defined estates in Danish society. Their appearance coincided with a pervasive economic and demographic decline caused

²⁸ See Michael H. Gelting, "Legal Reform and the Development of Peasant Dependence in Thirteenth-Century Denmark", eds. Paul Freedman and Monique Bourin, *Forms of Servitude in Northern and Central Europe: Decline, Resistance, and Expansion* (Medieval Texts and Cultures of Northern Europe 9) (Turnhout, 2005), pp. 343–367.

²⁹ Ulsig, "Landboer og bryder, skat og landgilde".

³⁰ Erik Ulsig, "Herremændene i Jyske Lov", *Historisk Tidsskrift* [hereafter HT] 106 (2006), pp. 1–9.

³¹ Jens E. Olesen, "Senmiddelalderens danske stændersamfund", eds. Agnes S. Arnórsdóttir, Per Ingesman and Bjørn Poulsen, *Konge, kirke og samfund. De to øvrighedsmagter i dansk senmiddelalder* (Aarhus, 2007), pp. 13–35. On the awareness of living in a town or the countryside, see Bjørn Poulsen, "Forholdet mellem land og by i dansk middelalder", *HT* 2009, pp. 1–19.

by successive waves of plague (from time to time combined with famine) that ravaged Europe during these decades.

The demographic collapse of the fourteenth century deepened the agricultural crises due to labour shortages, and this time it meant that many farmsteads and lands were left fallow. But this turned out to be a blessing in disguise for the surviving farmers, who were able to turn to the cultivation of less marginal lands and thus to enjoy more economic and social freedom: The magnates were in shortage of labour and thus had to re-adjust the system of cultivation from being based on and centred on large landed estates to smaller units and more free structures for the lesser farmers holding a farm on copyhold tenure. It comes as no surprise that the great landowners saw this development and the single farmer's possibility to move to another lord as yet a sign of crisis and at the end of the fifteenth century we see the first regulated attempts in Denmark to tie farmers to the land where they live (with the so-called *vornedskab*). In Danish historiography this has been seen as a one-sided bad deal for the lesser farmers, who lost their freedom, but in a strongly stratified society lacking a strong and protective central power it was often their only possibility to be protected and thus to continue inhabiting their farmsteads and cultivating their lands. And it seems that the lesser farmers were not that disabled to act in legal matters at the local *ting*, not even in the late fifteenth century.³² Farmers do even appear to have used the *ting* as an opportunity for political actions, although the lack of leaders, information and communication infrastructure meant that the rural population never reached a level of organisation that allowed them to form a politically significant estate.³³ On the other hand, many farmers were no longer free and, from the end of the fifteenth century, a clear distinction existed between those who had political rights, mainly magnates and bishops, and those who did not, namely lesser farmers and burghers.

In the same way, an increased distinction was drawn between the most powerful and the slightly less powerful, that is between the high and low nobility, but overall the increasingly self-aware nobility gained

³² See Jeppe Büchert Netterstrøm, *At forsvare til rette. Værnsforholdet og bøndernes retslige stilling i Danmarks senmiddelalder 1400–1513* (Kerteminde, 2003).

³³ See E. Ladewig Petersen, *Fra standssamfund til rangssamfund 1500–1700. Dansk socialhistorie 3* (Copenhagen, 1980), pp. 177–178; Michael Hertz, “‘Beskeden man’—Landalmuen som politisk faktor i dansk senmiddelalder. En skitse”, *Bol og by: Landbohøistidsskrift* 2 (1978), pp. 77–106.

a key position in late medieval society. By this time, the nobility had become by and large the largest landowner class in the realm, although with great local and regional variation, possessing about 40 % of lands whilst the church and its bishops, monasteries and so on controlled about 35 % and the king controlled only about 10 %. However, the king was also the protector of the remaining land-owning lesser farmers who owned the other 15 %.³⁴

Contributing to the increased importance of the nobility was the reconstruction of the kingdom undertaken by fourteenth and fifteenth-century Danish rulers as a consequence of the fact that much royal land had been used as collateral for loans in the first decades of the fourteenth century. After the civil wars of the late thirteenth century, King Eric Menved (r. 1286–1319) initiated a programme of castle building in an apparent attempt to gather large areas of land under royal control. In practice, this increased control meant that a noble *lensmand* was in charge of the larger castles where he exercised royal authority and managed crown lands in those *herreder* (districts) that were part of his *len* because such new castles needed income from several *herreder* in order to finance their running, manning and upkeep. However, we have no detailed knowledge about this programme. We do however know about royal administration at the time of Valdemar IV ‘Atterdag’ (‘New Day’) (r. 1340–1375), who was the architect behind a new phase of reconstruction.³⁵ He allowed the *lensmænd* comparatively free rein in their administration and control over royal incomes, and since the *herreder*, villages and boroughs were to a large extent independently governed, royal administration in the late medieval period—and also in the first half century following the Reformation of 1536³⁶—must be characterised as decentralised, but in a controlled manner.

³⁴ Carsten Porskrog Rasmussen, “Jordbesiddelse og magt lokalt og regionalt”, eds. Agnes S. Arnórsdóttir, Per Ingeman and Bjørn Poulsen, *Konge, kirke og samfund. De to øvrighedsmagter i dansk senmiddelalder* (Aarhus, 2007), pp. 73–116.

³⁵ See Henrik Lerdam, *Danske len og lensmænd 1370–1443* (Copenhagen, 1996), og Olesen, “Middelalderen til 1536”, pp. 24–29. See also Henrik Lerdam, *Kongen og tinget. Det senmiddelalderlige retsvæsen 1340–1448* (Copenhagen, 2001), pp. 35–38.

³⁶ E. Ladewig Petersen, “Reformationstiden 1536–96: Modernisering—justering”, eds. Leon Jespersen and E. Ladewig Petersen, *Dansk forvaltningshistorie I. Stat, forvaltning og samfund. Fra middelalderen til 1901* (Copenhagen, 2000), pp. 49–93, esp. 50–75.

At national level, the period after the Reformation was, by and large, characterised by a co-operation between royal power and the Council of the Realm, which consisted of members of the high nobility, who by this time had become the only political representatives of the people. Various kings in the High Middle Ages had a number of personally chosen advisors amongst the 'best men of the realm', i.e. among the most powerful magnates. However, as a counter-balance to royal power a constitutional institution, the *Rigsråd* (Council of the Realm), consisting of the realm's most powerful men, had crystallised through the increased differentiation of the estates and the increasing distinction between free and un-free in the fourteenth and fifteenth centuries. Thus from the beginning of the fourteenth century a tradition developed that new kings published their *håndfæstning* to the Council of the Realm upon their ascension to the throne and thus the Council came to appear as the representative of the people with a right to audit the king's administration, exercise of power and general adherence to the promises of the *håndfæstning*.

The members of the Council of the Realm were in a strange conflict of interest because they had the right to elect and when necessary depose a king, but at the same time it was the king who appointed the Council's members and endowed them with lands, not least after the Reformation in 1536 when the property of the Church was confiscated by the king, who sold it to and exchanged it with, to a large extent, the nobility. If the king and the Council of the Realm cooperated, both parties stood to win, and in the long run this meant that the Council gained influence both on legislation and acted as judges at the king's courts. In principle, the nobility as a unit and as freemen was a privileged estate, but in reality only a few of them, centred on the Council of the Realm, profited substantially from their comprehensive collaboration with the king.

Naturally, the Danish administration of justice developed substantially during this time, primarily towards an increasingly hierarchical system of courts, and to a lesser degree, towards increasingly clear ethical demands of those administrators who manned these courts. The development of the administration of justice reflected the system of power politics in which the royal power, with occasional relapses, developed into a stronger and ultimately formally omnipresent central power that could define the limits for justice to benefit both its own power politics and the legal protection of its citizens. Thus it became possible for the king to put in place largely self-sufficient judges in

local *ting* and a royal central court became the final link in a formal system of appeal. But the development was slow and changes in late medieval legislation were often made after changes in practice so that the law-givers attempted to standardise or correct deficiencies or dangers in the way in which practice had modified local systems.

The Geographical Coverage of this Study

This study covers the Danish realm during the time of the provincial laws, i.e. from the end of the twelfth century and first part of the thirteenth century until the compilation of the first Reformed laws collected together in the Koldingske Recess of 1558 (named after the borough Kolding in Jylland). During these four centuries the Danish realm was far from the homogenous unit we know today. New lands were conquered and some were lost in the innumerable wars against neighbouring princes that were fought at regular intervals, and other areas intermittently entered into a union with the Danish realm, most commonly so that they shared the same monarch but differed in economic, political and legal systems and institutions. Throughout the whole period, the central part of the Danish realm consisted of Jylland, Skåne, Sjælland, the islands south of Sjælland and the Duchy of Schleswig. This made up the central core of the Danish realm and although there were overseas lands more loosely affiliated to this core, these were comparatively few and were normally administrated according to other norms and guidelines than the core lands.

The areas that entered into an association with Denmark for shorter or longer periods, either as allies or as subjects, can be divided into personal unions and subject areas that to some degree were parts of the Danish realm. The personal unions, where there was a political union between two independent states united by a common head of state, were the Duchy of Schleswig (until 1864, which followed the law of Jylland), Holstein (1460–1864) and the kingdoms of Norway (1380–1814) and Sweden (1397–1523). The subject areas were primarily the Skåne lands (up to 1658)—Skåne, Blekinge and Halland (apart from a brief period 1332–1360 when these lands were collateral for loans and were subject to the Swedish crown). In addition, the many more or less brief conquests in and around the Baltic, i.e. Gotland (1361–1645), Wendia in northern Germany (1204–1227) and Harrien-Wirland (Harju and Virumaa) in Estonia (1219–1346).

The Administrative Division and Judicial Administration

The institutions of the administration of justice are those institutions that administer justice, i.e. on the one hand, those institutions that decide whether a transgression against the law has taken place and who in that case committed it, and, on the other hand, those institutions that subsequently administer punishment or sanctions as a consequence of this legal transgression. In the modern legal system this includes *both* the sentencing institutions, i.e. the different courts in a hierarchical system, with possibilities for appeal, *and* the executive institutions—the police, bailiffs and prison service, etc. In other words, public institutions with clearly defined responsibilities and jurisdictions.

Such institutions did not exist in the period covered by this study. The development of the public institutional legal system that we know today has taken a long time and has not always moved at the same pace since the circumstances of legal activity were usually determined by changing balances of power between kings, the Church, noble magnates and the local population. However, for the period as a whole, we can say that there was a clear development from a fundamentally private legal system towards an (embryonic) public legal system.

In this study I will distinguish between institutions wielding sentencing and executive powers. While the latter consisted of comparatively few kinds of offices, the former was different, in particular because the institutions with sentencing powers were divided into three levels—local, regional and national.

Locally we find *herreds-*, *birke-* and *byting* and the *sysselting*, which belonged in the *herreder*, *birke*, towns and *sysler*. Regionally we find the *landsting* (provincial courts), which covered a larger geographical area and were held in greater esteem, for which reason they also increasingly served as the court of first instance for the nobility. The provincial *ting* consisted primarily of the main provincial *ting* for Jylland, Sjælland and Skåne, and then of the lesser provincial *ting* in other parts of the realm, i.e. the islands Fyn, Lolland-Falster, Bornholm, Langeland, Møn, Sønderjylland (Urnehoved *ting* in Southern Jutland), Halland and Blekinge. Some of these lesser provincial courts ceased functioning during the later Middle Ages and their jurisdictions were incorporated into the nearest main provincial court while the other provincial courts continued their existence well into the seventeenth century. On the national level we find only one court, namely the royal court of law.

The division into *herreder* (*hæraeth*, *provincia*) and *land* (land, *terra*), which is known from sources dating to the end of the eleventh century and the beginning of the twelfth century,³⁷ seems to have formed an early foundation for the division of Denmark into jurisdictions. Where to find the origins of this division of the kingdom into larger regions and geographically smaller *herreder* is hotly debated among historians, but the surviving sources give a clear picture that both units were functioning early as well-defined legal areas with the *lands-* and *herredsting* as ordinary courts.³⁸

Originally, the responsibility for the execution of justice rested with a *ting*, consisting of all men who attended its meetings, but from the end of the thirteenth century an official of the king presided over these negotiations. This change-over happened relatively quickly at the *herredsting*, where from around 1400 the *foged* (bailiff) of the *herred*—an official who was mainly nominated by a royal *lensmand* who often had authority over several *herreder*—personally passed sentences. On the other hand, the same process was only completed towards the end of the sixteenth century at the level of royal appointments for provincial judges who presided over the *landsting*. Until then, the provincial judge passed sentence after consulting those magnates who were present at the *ting*.

The *birke* were an exception in comparison to the *herred* and the provinces, and were under royal, noble or ecclesiastical jurisdiction during the Middle Ages. The *birke* were independent jurisdictions and separate from the *herreder* and thus exempt from the ordinary *herred* jurisdiction; they were like the English ‘peculiars’, e.g. a jurisdiction exempt from the ordinary jurisdiction in whose territory it lies. Thus, within the *birke*, there was also an independent *ting* presided over by a *birkefoged*. These *birke* consisted either of the king’s own lands or the lands of prelates or, from the middle of the fifteenth century, they were separate lands in the *herred* granted as a royal favour to a local noble or landowner. This kind of privilege was a royal acknowledgement of the fact that the *birke* was a special jurisdiction with the right

³⁷ See DD 1:2:21 (1085) and ch. 23 in *Ælnoth's Chronicle*, VSD, vol. 1, p. 111 (c. 1120).

³⁸ For a discussion of their origins, see Poul Johs. Jørgensen, *Dansk Retshistorie. Retskilderne og Forfatningsrettens Historie indtil sidste Halvdel af det 17. Aarhundrede* (Copenhagen, 2nd ed., 1947), pp. 233–239. The following is based on Jørgensen, *Dansk Retshistorie*, pp. 505–508.

to pass sentence in accordance with valid law, for which reason the *birke* had its own *ting* where the inhabitants decided their internal affairs and where aliens wishing to pursue a suit against an inhabitant of the *birk* had to initiate his case.³⁹ Even though a privileged magnate probably had a decisive voice in deciding suits, the losing party to a suit decided by the *birketing* had the right to appeal to the provincial *ting*. Thus from the sixteenth century, the provincial *ting* functioned as the second court of instance for the *birketing*, just as had happened in the case of the *herredsting*.⁴⁰

However, a particular type of *birke* can be distinguished in the thirteenth and fourteenth centuries. This was the borough, which gained privileges including the right to pass local laws that were suited to the commercial needs of such towns and the right to hold their own courts. It was the fact that they had their own laws that in time separated them out from other *birke*. In the boroughs, the courts were presided over by the town *foged*, who, like his colleagues in the *herreder*, in time gained personal powers in sentencing if a case had initiated at the borough *ting*. As boroughs developed their own government—mayors and councillors—they also developed the so-called *rådstueretter* (that is ‘the town council’s court’) which often competed with the ordinary court of the borough and in some areas heard and decided cases such as disagreements among craftsmen, and in other places took on the function of a separate instance of appeal for cases originated in the borough *ting*.⁴¹

That it was possible to introduce a hierarchy of courts with such a hierarchy’s possibilities for appeal against sentences where a ‘superior’ court could overthrow the decision of an ‘inferior’ court is evidence of a centralisation of the administration of justice. This centralisation is possibly best reflected in the king’s increasing rights to pass sentence at the royal *ting* and during the annual *Herredage*, days in which the king passed sentence in consultation with the Council of the Realm. From as early as the twelfth century we have examples of occasions when the king decided disputes over property, but his authority increased around 1300 to cover other areas of dispute so that the increasingly

³⁹ See Henrik Lerdam, *Birk, lov og ret. Birkerettens historie i Danmark indtil 1600* (Copenhagen, 2004).

⁴⁰ Jørgensen, *Dansk Retshistorie*, pp. 508–510.

⁴¹ Jørgensen, *Dansk Retshistorie*, pp. 510–513, and Ditlev Tamm, *Lærebog i dansk retshistorie* (Copenhagen, 1989), pp. 127–129, 245–250.

institutionalised royal court of law could also decide criminal disputes. Thus the royal court of law developed into the final court of appeal while it retained its function as a first instance court competing with other courts. As kings increasingly curtailed their travels around the country and stayed in their own royal castles and with magnates, the royal court of law also changed from being an itinerant court to being one primarily based in Copenhagen. Thus it was the forerunner for the Supreme Court (founded in 1661, the year after the introduction of absolutism in Denmark).⁴²

The institutions that held sentencing powers will be a part of this study. In contrast, there were a number of institutions that functioned along the same lines as the institutions already mentioned but which will not be a part of this study either since they did not themselves have the right to pass sentence or because they can only peripherally contribute to the main subject of this investigation. Among these institutions we find the *syssel* and *sysseleting* found in Jylland; the omnipresent village moot (*landsbystævner*)—also known as *grandestævner*—; those ad-hoc tribunals convened by noble landowners to decide disputes between their dependents; and the guilds or *laug* which regulated their members' interaction and decided disputes between them. In addition to this group we find those courts that treated cases regarding church property or clerics.

The origins of the *syssel* in Jylland are difficult to identify, as are the origins of the *herred* and the provinces: generally they are thought to have originated at a time when Jylland was not a fully integrated part of the realm, i.e. before the year 1000. There is no firm evidence for such an assumption, but since each *syssel* contained a varying number of *herreder*, it is clear that the unit of the *syssel* developed later.⁴³ However, comparing the *syssel* to the *herred*, the former distinguishes itself by being a larger unit of administration, which by and large coincided with the Church organisation of territories.⁴⁴ The earliest sources that mention *syssel* originated in the ecclesiastical administration, and those *sysler* that preserved *sysseleting* in the Late Middle Ages owed their preservation to the Church's continued use of this *ting*. The *sys-*

⁴² Jørgensen, *Dansk Retshistorie*, pp. 517–524, and Tamm, *Lærebog i dansk retshistorie*, pp. 83–87, pp. 122–129, 245–250.

⁴³ Jørgensen, *Dansk Retshistorie*, pp. 241–243.

⁴⁴ I have suggested previously that the *syssel* must be seen as an ecclesiastical rather than secular administrative unit, see Andersen, *Rex imperator in regno suo*, pp. 69–74.

selting and the division of *syssel* in the Danish kingdom as an administrative unit disappeared quickly after the Reformation.⁴⁵

The major reason why the *sysselting* are not a part of this study is, however, entirely different. They seem not to have had a right to pass sentence. Against a background of a comparatively large number of mentions of *sysselting* found in medieval sources, it seems as if these *ting* primarily served the function of publicly announcing transfers of property, etc., so that such transactions became publicly known and could be witnessed by others if a legal dispute should subsequently arise. The *sysselting*, which was occasionally known as the *bygdeting*, did not decide such cases, which had to be pursued at either the *herred* or the provincial *ting*. The purpose of the *syssel* or the *bygdeting* seems thus to have been a forum for providing public witness to transactions.⁴⁶

Significantly smaller were the *landsby-* (village-) or *grandestævner*, known from the end of the fifteenth century, in which villages were given autonomy and the right to organise matters related to land and land use through majority decisions and to carry out agreed decisions concerning these. In order that there be no doubt concerning which decisions had been agreed in individual villages, these were often written down. However, this process mostly took place in the second half of the seventeenth century. It is clear from these bylaws that the most severe sanction that could be imposed by the *landsbystævne* were (quite considerable) fines.⁴⁷ According to several bylaws, the purpose of the bylaws and the *landsbystævne* in general was to prevent legal cases arising (and thus the involvement of the nobility). It also does not appear that the decisions of the *landsbystævne* were normally disputed at local *herredsting*, which were the proper first instance courts in some cases⁴⁸—but only after arbitration had been attempted at the

⁴⁵ Jørgensen, *Dansk Retshistorie*, pp. 398–399, 506–507.

⁴⁶ This and the institution of the 'bishop and his best *bygdemænd*' (see below) bear witness to the ecclesiastical origins of the institution: on the one hand ecclesiastical courts could not pass sentence in secular matters, on the other hand the idea of the witness of the *ting* being required e.g. in cases of property transfer can be seen as an expression of the Church's attempt to secure peace by encouraging the publication of legal transactions.

⁴⁷ Jørgensen, *Dansk Retshistorie*, pp. 124–126, 481–482.

⁴⁸ See Hans Henrik Appel, *Tinget, magten og æren. Studier i sociale processer og magtrelationer i et jysk bondesamfund i 1600-tallet* (Odense, 1999), pp. 243–251.

landsbystævne.⁴⁹ Thus the *landsbystævne* was an institution that pronounced decisions in cases concerning the cultivation of land, but in practice it seems to have been a forum for arbitration and this is partially the reason why I do not include it in the present study. The other reason is that this institution left few sources for the period under investigation and it would be methodologically unsound to use late-eighteenth-century evidence to illuminate an earlier historical period.

Apart from these 'common', that is commonly used, courts we find a number of other courts that can also be characterised with specific jurisdictions. Mostly these treated cases involving persons who were affiliated to a particular institution.⁵⁰ Amongst these was the *gårdsret*, that is the ad-hoc tribunal that noble landowners convened in order to determine individual disputes among their serfs.⁵¹ We find comparative structures in guilds and *laug*, which regulated relationships and decided conflicts between their members. Guilds were usually centred on religious a specific religious activity such as the veneration of a particular saint but they also provided a social network and security for members' families in case the guild member fell ill or died. The *laug*, on the other hand, were trade associations of equal and independent tradesmen sharing a common trade in towns and the *laug* had the responsibility for controlling the number of tradesmen in towns, making sure that there were no more than necessary and determining standards and prices for their work. In both cases the guilds and *laug* could impose a number of sanctions on those members who did not behave to the required standard set by the guild's aim and charter. These sanctions, which were collected together with the charter into a so-called *skra* (a collection of rules), required that there was procedure and a court-like sentencing.⁵² Thus, the Guilds had jurisdiction over its members. Therefore, these institutions and their procedure are only occasionally interesting in a study that focuses on *common* Danish legal procedure and Danish institutions of legal administration.

This distinction I have drawn between the common procedural law—to be understood as the legal procedure to be followed by every inhab-

⁴⁹ Knud E. Korff, *Ret og pligt i det 17. århundrede. Retspraksis samt økonomiske, sociale og kriminelle forhold i Åsum herred 1640–48* (Odense, 1997), pp. 123–132.

⁵⁰ See Jørgensen, *Dansk Retshistorie*, p. 524.

⁵¹ See Jørgensen, *Dansk Retshistorie*, pp. 56–64, 524–525.

⁵² See Jørgensen, *Dansk Retshistorie*, pp. 444–458.

itant in a given geographical area—and particular legal procedures is made to maintain a focus on the main aim of my investigation, that is the development of common Danish procedural law, not in order to dismiss the significance of such peculiar jurisdictions. Investigations of peculiar jurisdictions and legal institutions would obscure the picture of the main national developments that this study aims to provide.

This is also the reason that I will not treat separately the ecclesiastical jurisdiction. It has been claimed that it is impossible to say much about ecclesiastical jurisdiction in Denmark in the Middle Ages⁵³ since the myriad sources that these courts produced were lost during the Reformation. However, it has been claimed (correctly in my opinion) that the meagre survivals that we do possess from these courts demonstrate that ecclesiastical administration of justice in medieval Denmark followed the patterns that we know from continental Europe.⁵⁴ I could therefore have included an investigation into whether this is also the case for legal procedure in so far as we can illuminate this problem from the surviving sources, but this is such an extensive problem that a proper investigation is not possible within the limits of this monograph. Thus, although I have not included ecclesiastical procedure and legal institutions to any noticeable degree in this study it is not because I am unwilling to do so, but only because of considerations of length and the fact that throughout the Middle Ages and all the way to the seventeenth century legal authorities emphasised time and time again that the secular and ecclesiastical were two separate systems of law and that clerics could not appear before secular courts nor could cases involving the fabric of the Church be heard by secular courts.⁵⁵

⁵³ Harald Jørgensen, *Lokaladministrationen i Danmark: oprindelse og historisk udvikling indtil 1970. En oversigt* (Copenhagen, 1985), pp. 47–64, provides an overview of the subject.

⁵⁴ The most important studies in the field are those of Troels Dahlerup and Per Ingesman, for example Troels Dahlerup, *Studier i senmiddelalderlig dansk Kirkeorganisation* (Kirkehistoriske Studier 2:18) (Copenhagen, 1963), and *Det danske Sysselprovsti i Middelalderen* (Copenhagen, 1968); Per Ingesman, *Provisioner og processer. Den romerske Rota og dens behandling af danske sager i middelalderen* (Aarhus, 2003).

⁵⁵ See DD 2:4:273; DD 2:6:16; DD 2:7:98; DD 2:9:320. There are also an example in *Repertorium diplomaticum regni Danici mediævalis. Fortegnelse over Danmarks Breve fra Middelalderen, med Udtog af de hidtil utrykte*, 2 series, 13 vol., eds. Kr. Erslev, William Christensen and Anna Hude (Copenhagen, 1894–1939) [hereafter Rep.], 1:3:6228. And the same goes for *Den danske rigsløvgivning 1397–1513*, ed. Aage Andersen (Copenhagen, 1989) [hereafter DRL 2], 34.

So what is left is once again to establish that the current monograph or investigation of ordinary legal procedure and its practice in the Middle Ages will include the institutions administering justice locally at the *herreds*-, *birke*- and *byting*, the *landsting* at the regional level and the royal court of law at the level of the realm. Other institutions will only be included in so far as they can contribute to a general overall picture of developments.

It is however worth noting that each of the above-mentioned institutions had its own procedure, which was inspired by and developed against a background of political, ideological, social, economic and educational conditions. Changing social relations decided how, and to what extent, individual legal-interest groups could exercise an influence on law, legal administration and the legal system, and therefore significant differences in procedure can be found between individual legal institutions.

CHAPTER TWO

THE TRADITION—AND THE NEW PARADIGM

Even though this study of medieval Danish legal procedure is intended for an international audience, its starting-point is the Danish tradition of legal history, which has informed and penetrated a large part of Danish historiography. Just like many other countries, Danish historiography has been facing inwards for the last century, focusing on what has been presumed to be a specifically Danish rather than a common European tradition.¹ In terms of legal procedure, the emphasis on interior Danish politics as the driving force behind the development of medieval Danish laws is most clearly seen in what is so far the most comprehensive study of Danish legal history, Henning Matzen's six-volume *Forelæsninger over den Danske Retshistorie* (1893–1897).² While Volume I treats the fundamental laws for the Danish national state, that is constitutional law, Volume II deals with procedural law. In his introductory remarks, Matzen argues that not only is procedural law a fundamental part of any legal system but also that procedural law, because of its primacy, reflects a particular and national way of organising law. This is because:

The same realisation that lead the populace of countries to accept rules for human intercourse also had to make it clear to them that the observance of or a transgression against these rules could not be an insignificant thing...but before one could define the consequences of these substantial breaches of transgressions against the law...it had to be determined whether a real transgression had been committed in such a way that it meant that someone was responsible, and by whom....Therefore, an organised system of rules for determining whether a legal transgression had been made, and by whom, had to be decided so that decisions were made both about the authorities who were to determine transgressions and about the procedure that had to be observed in order to make their

¹ See Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (Oxford, 3rd ed., 1998), pp. 2–3, pp. 48–62; Kjell Å. Modéer, “Der Verlierer als Sieger? Rechtsgeschichte und Rechtsvergleichung—ein neuer Schulstreit”, ed. Kjell Å. Modéer, *Europäische Rechtsgeschichte und europäische Integration* (Stockholm, 2002), pp. 93–108.

² Henning Matzen, *Forelæsninger over den danske Retshistorie*, 6 vol. (Copenhagen, 1893–1897).

decision sound...for this reason, rules of procedure constitute...an ancient part of the legal system of nations.³

With these words, Matzen emphasised not only that procedural law is, and always has been, a central part of a legal system, but also that law cannot be conceptualised without procedural law, i.e. without rules concerning *how one decides whether a transgression has been made*. Indeed, one must argue that procedural law, regardless of its size and comprehensiveness, is a necessary precondition for a well-functioning legal system or any system regulating substantial law. The precondition for any legal system worth its salt must be that there is a considerable degree of consensus in society (or at least amongst magnates) about how one decides whether a transgression has taken place and who committed the transgression. Such a system of procedure is simply the prerequisite for the acceptance and effective application of substantial rules.⁴ Procedural law is, so to speak, the spine of the legal system and of law. It is what connects the rest of the jurisdictions and the legal system together and makes it possible for them to function.

With the exception of the legal historian Ludvig Holberg,⁵ with whom Matzen had many arguments, Matzen's analysis of foreign law's significance to Danish law was characteristic of his period. His starting-point was "our law has remained national"⁶ and this idea meant that Matzen did not pay particular attention to the European *ius commune*, which played such a significant part in the development of other European laws in the Middle Ages. The terminology that we encounter in the Danish provincial laws is clearly different from the one we find in learned European *ius commune* legal procedure, and from this premise Matzen found that Danish legal procedure was a particularly Danish way of organising the administration of justice. He did not identify non-terminological similarities between Danish and learned legal procedure in so far as these concerned the practical conduct of a suit.

In the Danish medieval provincial laws, and in other contemporary source materials, there are clear traces that tell us that the early administration of justice was based on the right of vengeance and feud

³ Matzen, *Forelæsninger over den danske Retshistorie*, vol. 2, pp. 3–4.

⁴ Lawrence M. Friedman, *The Legal System. A Social Science Perspective* (New York, 1957), p. 15.

⁵ Especially Holberg, *Dansk og fremmed Ret*.

⁶ Matzen, *Forelæsninger over den danske Retshistorie*, vol. 6, p. 2.

as a response to transgression of the law.⁷ The establishment of legal procedure that begins to take shape towards the end of the twelfth century was, presumably, an attempt to limit this aspect of the law to promote peace within society by regulating arbitration and clarifying rules concerning how a legal contest should be conducted in the public sphere.⁸

Presuming that legal procedure is based upon a desire to limit the extent to which people took the law into their own hands, there were—and still are—some fundamental elements that characterise any kind of commonly accepted, i.e. publicly known and therefore legitimate, legal procedure. There has to be a party who seeks the redress of law against another party for breaking the law; the defendant has to be notified about the suit; the parties must appear before some form of plenary meeting that guarantees that the suit and its consequences are publicly known; both, or at least one, of the parties must produce proof for their case; if proof is insufficient, and it is not proven that the defendant has transgressed against the law, some kind of legal authority must weigh the evidence and subsequently pronounce a judgement and finally the judgement that has been pronounced and the sanction that has been meted out must be enforced.

In addition there are, at least in modern law, a number of questions that are significant for the individual parts of the process, namely whether there is a kind of self-defence, i.e. that the defendant committed his transgression in connection with a legal defence of himself, his dependents or his property; who has the right to pursue a case, i.e. who can legally claim to have been inconvenienced by the transgression; can the plaintiff and the defendant be represented by proxy; is there a statute of limitation that makes it impossible to pursue a case against another person after a specified time span; and are there limits to delays, etc., so that the case is not extended unduly; is there a free law of evidence, i.e. does the case consist mainly of formal or substantial proof; is the sentencing authority unbiased in its evaluation of the evidence; is the sanction set beforehand or can it be imposed within certain parameters; can sentences be appealed; and who executes the punishment or sanction imposed by the court.

⁷ Ole Fenger, *Fejde og mandebod. Studier over slægtsansvaret i germansk og gammel dansk ret* (Copenhagen, 1971), pp. 341–434.

⁸ Helle Vogt, *The Function of Kinship in Medieval Nordic Legislation* (Leiden, 2010), pp. 87–104, 105–107.

All these elements constitute the practical part of procedural law and the administration of justice and, as such, they are independent of terminological similarities between legal traditions or legal systems. Therefore, I shall analyse these subjects in order to determine whether Danish legal procedure and administration of justice were unique compared to the learned law: the learned law that, against the foil of classical Roman law, was developed by the Church and universities during the High Middle Ages and subsequently further developed by new methods of interrogation. In this regard it is also interesting to question whether the reform of religion that was introduced in 1536 in Denmark was immediately noticeable in the administration of justice and therefore this study will extend as far as the year 1558, when post-Reformation legislation was compiled in the Koldingske Recess.

As I have mentioned above, Matzen's starting-point was that 'our law has remained national', that is that Danish law and its legal procedure was founded in and reflected a particularly Danish way of organising the administration of justice. This interpretation was characteristic of Matzen's contemporaries, who assumed that it was possible to trace the fundamental characteristics of nineteenth century Danish law back to the formation of the territorial states of the High Middle Ages, if not even further back in time.

It is, however, not only in Denmark that such an idea permeates the writing of history in the nineteenth and twentieth centuries. It is a common European assumption that individual modern nation states were the consequence of an early process during which areas with national traits were naturally attracted to one another. This is a tradition that sees the modern nation state and its organisation of justice as the definitive and natural end-state for all human societies. This 'state-evolutionary' tradition can be traced back to the beginning of the sixteenth century, and its practitioners have focused their efforts on finding the seed of the social structures and institutions that we know today. They have often been more focused on explaining the growth of the modern nation state than to understand the past on its own terms. This has meant that there has been a clear tendency to apply modern concepts and characteristics to the past, even though the sources were not able to sustain such an interpretation.⁹

⁹ See Reynolds, *Fiefs and Vassals*; Alan Harding, *Medieval Law and the Foundations of the State* (Oxford and New York, 2002); Hermanson, *Släkt, vänner och makt*. For

The consequence of this state-evolutionary tradition has been that there is a clear lack of studies comparing Denmark to Europe.¹⁰ The focus on the nation—‘the national paradigm’—has meant that there has been (and to some extent still is) a tendency to study Danish social and legal developments from purely Danish perspectives. If a study included non-Danish material, this was usually drawn from the Scandinavian countries, based on the idea that the Nordic countries had shared a ‘folk’ tradition since the period of migration (*Völkerwanderung*) in the fourth to eighth centuries AD.¹¹ This starting-point means that historians have focused on other Nordic sources in order to find similarities between them while also identifying differences from other European sources that would demonstrate that the Nordic, and particularly Danish, social and legal order were unique.¹² The intention behind this approach was to disprove the German Historicism that claimed that the Danish legal order, like the legal order in other Nordic countries, was an original *urgermanisch* way of organising society and law.¹³ For this reason Danish historians may sometimes have over-compensated in favour of the national perspective rather than identifying possible similarities to European developments, which instead were never properly investigated.

Many Danish and Nordic legal historians conclude that Denmark and the Nordic countries had a unique legal organisation of justice. This is not surprising given the existence of another tradition of history

an introduction to Danish legal historiography on this point, see Lars Björne, *Den nordiska rättsvetenskapens historia*, 4 vol. (Lund, 1995–2007), see vol. I, pp. 200–203 and 360–74; vol. II, pp. 92–96 and 229–348; vol. III, pp. 75–81 and 414–53; vol. IV, pp. 77–81.

¹⁰ Michael H. Gelting, “Det komparative perspektiv i dansk højmiddelalderforskning”, *HT* (1999), pp. 146–188, esp. 147–148.

¹¹ See for instance Jørgensen, *Dansk Retshistorie*, p. 6, and Matzen, *Forelæsninger over den danske Retshistorie*, vol. 1, pp. 30–31.

¹² See Kristian Erslev, “Europæisk Feudalisme og dansk Lensvæsen”, *HT* (1899–1900), pp. 247–304. See the historiographic analyses in Helge Paludan, “Vor danske Montesquieu”, *Historie* 3 (1980), pp. 1–32, and “Lighedens lov? Træk af dansk historieskrivnings syn på den sociale opbygning af landskabslovenes samfund gennem 200 år”, eds. Ole Fenger and Chr. R. Jansen, *Jydske Lov 750 år* (Viborg, 1991), pp. 51–64.

¹³ For a convincing rejection of this tradition, see Klaus von See, *Germanen-Ideologie: Vom Humanismus bis zur Gegenwart* (Frankfurt a.M., 1970), and *Altnordische Rechtswörter. Philologische Studien zur Rechtsauffassung und Rechtsgesinnung der Germanen* (Tübingen, 1964); Alexander C. Murray, *Germanic Kinship Structure. Studies in Law and Society in Antiquity and the Early Middle Ages* (Toronto, 1983); Maurizio Lupoi, *The Origins of the European Legal Order* (Cambridge, 2000); Vogt, *The Function of Kinship in Medieval Nordic Legislation*.

that is closely related to the idea of state evolution. This is the centre-periphery idea, which takes its starting-point in conceptualising the development of law in Europe as a process that begins in a cultural centre and is later extended into the cultural and geographical periphery of the continent. This idea remains one of the most important, although implicit, assumptions in European historiography. Based on their understanding of contemporary power structures, historians and legal historians have laboured under the assumption that almost all common (Western European) and institutional thinking took its origins in the ninth century in the court of the Christian emperor Charlemagne's empire.¹⁴ Thus for centuries cultural development went mainly in one direction, namely from the heartland of Carolingian culture—from Linz in the east to Rouen in the west, from Narbonne and Rome in the south to the Elbe in the north—to the geographically more peripheral parts of the continent.¹⁵ Implicitly, this has meant that state formation in the centre was thought to have culminated in a kind of ideal model, which all other less-developed state formations consciously or unconsciously tried to imitate. The organisation of society and legal order in the early modern nation-state such as France was thus projected back in time and assumed to have played a determining role as a cultural and institutional ideal for other contemporary territorial state formations.¹⁶

Among Nordic historians this interpretation meant that there was a common, shared certainty that even in the Middle Ages the Nordic countries were at the periphery of Europe and therefore took longer to adopt trends and ideas that originated in the cultural centre, if at all. So, according to this state-evolutionist tradition, not only was Denmark something special, but Danish society limped behind important social, legal and institutional developments in Europe for several centuries.¹⁷

¹⁴ See Carlrichard Brühl, *Deutschland-Frankreich: die Geburt zweier Völker* (Köln, 2nd ed., 1995), pp. 7–82.

¹⁵ See for example Norbert Elias, *Über den Prozess der Zivilisation*, 2 vol. (Basel, 1939; repr. 1989), esp. in vol. II, in which Elias draws upon Otto Hintze's idea that the central part of Western Europe influenced the rest of European culture in a concentric movement from the centre to the periphery, see Otto Hintze, *Gesammelte Abhandlungen*, 3 vol. (repr. Göttingen, 1962–1967), esp. vol. I, pp. 34–51, 120–139 and 390–423, and vol. III.

¹⁶ For an example, see Reynolds, *Fiefs and Vassals*.

¹⁷ For more recent Danish examples, see Lund, *Lið, leding og landeværn*; Annette Hoff, *Lov og landskab. Landskabslovenes bidrag til forståelsen af landbrugs- og land-*

This implicit starting-point has had a determining influence on the conceptual and methodological approach to the study of Danish medieval law. A particular emphasis was placed on the provincial laws that were written down during the period from the end of the twelfth century to the middle of the thirteenth, and which unquestionably are the surviving sources that tell us most about how law was conceptualised in medieval society. Almost unanimously, Danish legal historians have imagined that the rules of the provincial laws were not only a particularly Danish way of constructing law, but also the remains of an older legal tradition that was kept alive by a decidedly conservative approach to customary law and its nature.

A telling example of this approach is the Danish discussion of the genesis of the provincial laws. The decisive argument supporting earlier scholars' distinction between the Law of Jylland and the laws of the legal provinces of Skåne and Sjælland was the fact that the east Danish legal collections did not contain any indication of dating or publication that is a royal recognition of the law in the manner of the Law of Jylland. This led Danish legal historians to characterise Skånske Lov (The Law of Skåne), Valdemars Sjællandske Lov (Valdemar's Law for Sjælland—the oldest form of which was presumed to be the version known as Arvebog & Orbodemål, i.e. The Book on Inheritance and Heinous Crimes) and Eriks Sjællandske Lov (Eric's Law for Sjælland) as 'retsbøger' ('books of law'). Even Henning Matzen characterises them as 'vedtægter' (statutes) that were part of law without it being possible to characterise them as proper laws.¹⁸ Poul Johs. Jørgensen argued that they were private compilations compiled by influential men learned in law in the provincial *ting*, but apparently without these legal experts gaining the authorisation of the *ting* to write this law down. According to Jørgensen, in time these compilations gained such authority that in reality they gained recognition as official compilations of law, which means that the difference between the Law of Jylland and the east Danish provincial laws lay in the sole fact that the Law of Jylland had been promulgated—that is, it was published in one form or another whereas the other compilations were not: in terms of subjects

skabsudviklingen i Danmark ca. 900–1250 (Aarhus, 1997); Ole Fenger, "Med lov skal land bygges", eds. Per Ingesman, Ulla Kjær, Per Kristian Madsen and Jens Vellev, *Middelalderens Danmark. Kultur og samfund fra trosskifte til reformation* (Copenhagen, 1999), pp. 52–63.

¹⁸ Matzen, *Forelæsninger over den danske Retshistorie*, vol. 4, pp. 3, 168.

covered, their content was the same. The rules of the laws were the results of decisions made by the provincial *ting*, as these presumably were, and had been passed on through oral recitation, which according to Jørgensen must have preceded the writing down of concrete and relevant decisions in cases that formed the basis for the more general rules contained in the laws.¹⁹

I shall not comment further on the discussion of the fact that the Law of Jylland is a promulgated law code.²⁰ However, from the perspective of practice it seems that all provincial laws enjoyed the same authority in their respective jurisdictions, insofar as it is possible to judge practice from the very sparse evidence that survives. In practical terms medieval society did not care whether the law had been promulgated by the king.²¹ In addition, it should be noted that the absence of prologues to the Law of Skåne, Valdemar's Law for Sjælland and Eric's Law for Sjælland is not in itself convincing evidence that these laws were not promulgated. On the contrary, judging by the authority that they held, they were probably made publicly known by one means or another. For The Book on Inheritance and Heinous Crimes the situation is not different, but it can be added that if The Book on Inheritance is identical to the law mentioned in annals of the year 1170 and (parts of) The Book on Heinous Crimes are identical to the law that was agreed in a meeting between the king and his magnates in 1184 (see below in Chapter 4), a clear division between promulgated and non-promulgated law is impossible to maintain.

Thus, in my opinion, it makes no sense in this monograph to distinguish between whether a compilation of laws is statute or a private compilation of laws. I agree with Armin Wolf that those collections of law that were not immediately officially recognised were an expression of the political situation in which the rules originated. Legal collections of a 'private collection' nature were, according to Wolf, created in territories where the king had to compete for power with strong,

¹⁹ Jørgensen, *Dansk Retshistorie*, pp. 14–27.

²⁰ On concept of *promulgatio*, see Andersen, *Rex imperator in regno suo*, pp. 37–38. For an analysis of the difference between 'law' understood as written law and 'law' understood in a wider context as justice, see J.F.W. Schlegel, *Om de gamle Danskes Retssædvaner og Autonomie* (Copenhagen, 1822), pp. 324–325, and Vogt, *The Function of Kinship in Medieval Nordic Legislation*, pp. 27–31.

²¹ See Schlegel, *Om de gamle Danskes Retssædvaner og Anatomie*, p. 53.

semi-autonomous political groups or ecclesiastical powers, for which reason a royal 'grant of laws' was not possible.²²

Our starting-point in the present study of Danish procedural law until the Koldingske Recess is different from the traditional approach in its emphasis on the fact that law started in, and was formulated as a reaction to, the power politics of ever-changing groups of magnates. These groups were dependent on individuals who had a personal interest in affecting law and from time to time had the ability to do so. Thus my premise is not that the development of Danish procedural law is a linear progression that naturally developed into what we know today. Nor do I think that Danish procedural law in the period before the Koldingske Recess was the expression of a coherent, almost God-given, Danish concept of what was right and what was not. Instead I take my starting-point in the idea that Danish provincial laws must be seen as the result of compromises, between the king and the regional provincial *ting*, between kings and ever-changing regional and local powerful groups: and it is probably a development that took place heavily influenced by the Church. Therefore there will be no distinction drawn between whether a law was officially published or not—a crucial concern of older traditional legal history. Hence I align myself to the new approach to medieval law that older representatives of legal historical research in Nordic countries have characterised as 'radical' in comparison to the more conservative and homogenous ideas shared by the 'traditionalists'.²³

²² Armin Wolf, *Gesetzgebung in Europa 1100–1500. Zur Entstehung der Territorialstaaten*, (München, 2nd ed., 1996), pp. 27–30. See also Kjell Å. Modéer, *Historiska rättskällor. En introduktion i rättshistoria* (Stockholm, 1997), pp. 47–48; Inger Dübeck, "Skånske Lov og den europæiske baggrund", *Historie* (1990), pp. 396–420, esp. 398; Vogt, *The Function of Kinship in Medieval Nordic Legislation*, pp. 95–107. For a concrete interpretation of the Danish provincial laws in this light, see Andersen, *Lærd ret og verdslig lovgivning*, pp. 108–12, 143–146, 178–181, 271–298.

²³ See especially the discussion between Ole Fenger and Elsa Sjöholm in Ole Fenger, "Anm. af E. Sjöholm: Gesetze als Quellen mittelalterlicher Geschichte des Nordens", *HT* (1979), pp. 112–124; Ole Fenger, "Om kildeværdien af normative tekster", eds. K. Hastrup and P.M. Sørensen, *Tradition og historieskrivning* (Acta Jutlandica 63:2, hum. serie) (Aarhus, 1987), pp. 39–52; Elsa Sjöholm, "Rättshistorisk metod och teori-bildning", *Scandia* 2 (1978), pp. 229–256; Elsa Sjöholm, "Replik til Ole Fenger", *HT* (1981), pp. 219–222; Elsa Sjöholm, "Lagstiftningen i det tidiga medeltida samhället. Europeisk rättstradition i politisk omvandling", ed. I. Nordgren, *Dokumentation av Medeltidssymposiet i Lidköping 21–22. april 1990 i anledning af Götiska Förbundets 175-årsjubileum* (Götiska Skrifter 106) (Lindköping, 1990), pp. 22–25.

The Traditional and the New Paradigm

There are two paradigms in Danish legal history: the traditional paradigm and the new paradigm. The traditional paradigm fundamentally is a part of the state-evolution, centre-periphery tradition, while the new paradigm focuses more on the power-politics of medieval legal development. The traditional paradigm thus takes its starting-point in a popular-democratic idea that provincial courts were based in the people and autonomous units whose ideology was an expression of the will of the people while the new paradigm sees the provincial laws as an expression of contemporary power politics and confrontations. The consequences of the difference between these two approaches are considerable and reach far beyond the genesis of the provincial laws. They revolve around whether, and to which degree, the provincial laws reflect new norms at the time of their composition or simply are older, previously orally transmitted rules that were taken down in writing in connection with the wave of codification that gripped large parts of Europe in the early decades of the thirteenth century.

The central point of the traditional paradigm is that from the oldest times to the High Middle Ages the formation of law took place in people's minds and was given its external presence through the decisions of the people in the meetings of the *ting* and subsequently through the writing down of agreed legal norms in the provincial laws. Put simply, this idea means that the contents of the provincial laws must on one hand be a reflection of special local Danish ways of providing law and on the other hand must have been difficult to alter since they were based on long-lasting perceptions of what was right and proper. The exponents of this tradition, for example Poul Johs. Jørgensen and to a certain extent Ole Fenger, presumed that medieval law was based on an idea that old law was good law and therefore they argued that there was a reluctance to create new law. A consequence of this is that many Danish legal historians have seen linguistic and structural variants in the provincial laws as an expression of either mis-readings, mis-transcriptions and light, insignificant changes or remnants of older law, which through an uncomprehending copying was repeated time after time despite the fact that they were no longer part of current law. However, I regard some textual variants as later modifications of particular rules,²⁴ in contrast to the traditionalists who have explained

²⁴ See Andersen, *Lærd ret og verdslig lovgivning*.

such differences with hind-sight, arguing that they originated in a time before the legal compilations were written down.²⁵

It is an implicit assumption within the traditional paradigm that it is possible to study individual provincial laws as an expression of a common legal development within the realm and not necessarily just as an expression of the law of a particular province. The implicit assumption was that the same developmental lines are drawn across the realm meaning that it is possible to study the development of the earliest provincial law all the way to the Law of Jylland in 1241 (and later) as an expression of general *Danish* developments. Although traditionalists knew that “Danish rules of law were exposed to a massive influence from the canon law as the Church played an increasingly important role in Denmark”²⁶ they did not take into consideration that the Church and the royal power could have had different positions of power in local and regional power relations and networks. The whole development was after all moving towards the same goal: the modern state based on the rule of law.

The latter argument, i.e. that Church and royal power held different degrees of power in different provinces depending on their interaction with local power structures and networks, is a consequence of the new paradigm. Proponents of the newer approach have also studied legal similarities and differences based on the ideological differences found amongst different spheres of society in the Middle Ages. The result of such approaches and studies has been a rejection of the idea of ‘passive medieval man’ who unquestioningly obeyed authority in favour of a new idea that the different actors in medieval society, like modern man, employed more or less conscious strategies to achieve their aims or force through their ideas. In concrete legal terms, this new approach has lead to convincing rejections of: the idea of old law as good law;²⁷ of the High Medieval legal secular compilations being not influenced by learned law, mainly canon, and to a lesser extent Roman,

²⁵ For example Hoff, *Lov og landskab*, p. 11.

²⁶ Hoff, *Lov og landskab*, p. 11.

²⁷ See for example Herman Krause, “Dauer und Vergänglichkeit im mittelalterlichen Recht”, *ZSR. Germ. Abt.* 75 (1958), pp. 206–251; Knut Helle, “Rettsopfatninger og retsendringer. Europa og Norge i middelalderen”, eds. G.A. Ersland, E. Hovland and S. Dyrvik, *Festskrift til Historisk Instituttets 40-års jubileum* (Universitetet i Bergen, Skrifter 2) (Bergen, 1997), pp. 41–70; Sverre Bagge, “Law and Justice in Norway in the Middle Ages: A Case Study”, eds. Lars Bisgaard, Carsten Selch Jensen, Kurt Villads Jensen and John Lind, *Medieval Spirituality in Scandinavia and Europe. A Collection of Essays in Honour of Tore Nyberg* (Odense, 2001), pp. 73–86.

law;²⁸ and that the differences between individual versions of the same legal compilation were caused by mis-readings, mis-transcriptions and slight, mainly insignificant, changes against a background of an otherwise passive tradition of transmission. There are many recent studies that have demonstrated that even authoritative collections such as the *Decretum Gratiani*, the Sicilian Constitutions of Melfi and the Aragonese *Fueros de Aragón* have passed through several redactions and re-workings that resulted in both structural and linguistic changes and modernising and concrete changes in law.²⁹ Recently, Michael H. Gelting, Thomas Riis and I have identified the same developments in Danish provincial laws, in particular the Law of Jylland.³⁰ The demonstration of a medieval willingness to combine already known things in a new way, separating what has been created into smaller parts or rarifying already existing rules, is well known in other written genres, such as literature.³¹

The new idea of medieval legal development as a living process inspired ideologically by international developments and willing to change, is of course very significant for any analysis and description of the history of Danish medieval procedural law. A consequence of this is that it is in no way possible to provide a static picture of Danish procedural law such as the one provided by Matzen. Medieval law was constantly developing and was influenced by an increasing centralisation of power and increasingly learned legal expertise, which meant that during the Middle Ages we observe an increasing institutionalisation and distribution of competence between new and already existing institutions of legal administration. Therefore, in each of the follow-

²⁸ See for example Vogt, *The Function of Kinship in Medieval Nordic Legislation*; Tore Iversen, "Jordeie og jordleie—eiendomsbegrepet i norske middelalderlover", *Collegium Medievale* 14 (2001), pp. 79–114.

²⁹ See Anders Winroth, *The Making of Gratian's Decretum* (Cambridge, 2000); *Die Konstitutionen Friedrichs II. für sein Königreich Sizilien* (MGH. Constitutiones et Acta Publica Imperatorum et Regum, tomus II: Supplementum), ed. Wolfgang Stürner (Hannover, 1996) [hereafter Konst.]; Jesús Delgado Echeverría, *Fueros de Aragón* (Colección Mariano de Pano y Ruata 13) (Zaragoza, 1997).

³⁰ Michael H. Gelting, "Skånske Lov og Jyske Lov: Danmarks første kommissionsbetænkning og Danmarks første retsplejelov", eds. Henrik Dam, Lise Dybdahl and Finn Taksoe-Jensen, *Jura & historie. Festskrift til Inger Dübeck som forsker* (Copenhagen, 2003), pp. 43–80; Thomas Riis, "Det ældste håndskrift af Jyske Lov (Codex Holmiensis C 37)", *Fund og Forskning i Det kongelige Bibliotek* 43 (2004), pp. 43–52; Andersen, *Lærd ret og verdslig lovgivning*, pp. 216–226.

³¹ Jørgen Bruhn, "Bygge, skrive, koge", *Passepartout. Skrifter for Kunsthistorie* 25 (2005), pp. 149–159.

ing sections I will pay specific attention to showing Danish procedural law as constantly developing rather than presenting a static picture of a fossilised legal system. This is the case both for institutions for the administration of justice, i.e. institutions for sentencing or executive functions, and in regard to legal procedure, that is the pleading, the libel and the production of evidence and sentencing. Only in this way will it be possible in my opinion to avoid giving the wrong picture of the history of Danish procedural law in the Middle Ages.

Of course this does not mean that the dates, etc., that are provided in order to present a brief overview will remain uncontested by other legal historians or provide a final refutation of everything that has been written on the subject previously. The hypothesis, that medieval Danish law was lively and willing to change, is still a new insight in Danish historiography and therefore not commonly agreed upon. Future scholars may well find a number of objections both to the hypothesis and the dating of the provincial laws that I provide. However, both the main idea of the thesis and the dates provided are based on the first systematic study in recent years of the many manuscripts containing the Danish provincial laws,³² for which reason there is a certain body of evidence for this way of looking at Danish medieval legal development.

Thus my starting-point is that the normative sources of law are primarily an expression of how those people who formulated the law imagined how the ideal legal system and society should be constructed. Normative sources are thus not conceived in the manner of the older traditional scholarship that saw them as a mirror of reality, but instead as an expression of the ideology of the law-givers.³³

³² See Andersen, *Lærd ret og verdslig lovgivning*.

³³ The same background is found in Vogt, *The Function of Kinship in Medieval Nordic Legislation*; Michael H. Gelting, "Skånske Lov og Jyske Lov"; Michael H. Gelting, "Marriage, Peace and the Canonical Incest Prohibitions. Making Sense of an Absurdity?" ed. Mia Korpiola, *Nordic Perspectives on Medieval Canon Law* (Publications of Matthias Calonius Society 2) (Saarijärvi, 1999), pp. 93–124; Michael H. Gelting, "Odelsrett—lovbydelse—bördsrätt—retrait lignager. Kindred and Land in the Nordic Countries in the Twelfth and Thirteenth Centuries", ed. Lars Ivar Hansen, *Family, Marriage and Property Devolution in the Middle Ages* (Tromsø, 2000), pp. 133–165; Gelting, "Pope Alexander III and Danish Law of Inheritance".

CHAPTER THREE

LEARNED LAW AND SECULAR LEGISLATION

Before we study the medieval Danish legal procedure, we must know the background better, starting with the comprehensive and systematic collection of canon law texts known as Gratian's *Decretum* which became available in its second revised version around the year 1159.¹ With its juridical, dogmatic and moral-theological harmonisation of the common rules and conciliar decisions, it created a synthesis that in time was to gain great but unofficial authority amongst the clergy. While never officially promulgated, this frequently distributed and utilised collection of laws provided the Church with a unified legal system. The need for such a unified system of canon law had become urgent because of the increasing institutionalisation of the papal Church, which the Gregorian reform movement organised from the end of the eleventh century,² and in classical Roman law, as found in the *Corpus Iuris Civilis*, the Church had found a corpus of law whose model it now tried to imitate with regard to ecclesiastical relations and the fabric of the church. The aim of Gratian's *Decretum*, the original title of which was the telling *Concordia discordantium canonum*, was an attempt to systematise and harmonise the many, frequently divergent, decisions in individual cases that constituted Canon law. Such a collection could also function as a kind of textbook for teaching members of the clergy.³

¹ Winroth, *The Making of Gratian's Decretum*.

² Harold J. Berman, *Law and Revolution. The formation of the Western Legal Tradition* (Massachusetts, 1983), p. 118. But whoever Gratian may have been, he was not the first working on or succeeding in working out such a collection. Compare Greta Austen, *Shaping Church Law Around 1000. The Decretum of Burchard of Worms* (Farnham, 2009).

³ Gratian's *Decretum* is published in *Corpus Iuris Canonici I: Decretum magistri Gratiani*, ed. Lipsiensis secunda post Aemilii Ludovici Richteri curas, ad librorum manu scriptorum et editionis Romanae fidem recognovit et adnotatione critica instruxit Aemilius Friedberg (Lipsiae, 1879–81). In the following, the *Decretum* is quoted by indicating the number of the canon and that of the distinction (D.) or of the cause (C.) and the question (q.).

Gratian's *Decretum* was never formally promulgated as the official law book of the Church and did not entirely replace all other collections of canon law, although it was frequently quoted in papal decretals by Pope Clement III (1187–1191). From the end of the twelfth century, it was used and commented on across Europe by those educated in law, the learned Decretists. Thus canon law became a discipline in itself, just like the study of the more secular Roman law. The two disciplines, however, were so interwoven that it must often have been difficult to distinguish between them because the Decretists utilised Roman law as a tool to decode the terminology and methodology of canon law as it was found in Gratian's *Decretum*.

The popularity of the *Decretum* meant that it gained great influence, and from the end of the twelfth century new decretals were added to it. Decretals were decisions in specific cases that, by their inclusion in Gratian's *Decretum*, had created precedents. In the first instance, these decisions intended to form precedents were added somewhat haphazardly, but later they were added in more organised collections. Between 1191 and 1226, five such collections were compiled, which were to become known as the *Quinque compilationes antiquae*. Each of these collections built on the foundations laid by its predecessor, but added decisions that had been made since the previous collection. These collections were commented upon, as Gratian's collection had been, despite the fact that they too, with one exception, were not officially recognised. The exception was the so-called *Compilatio tertia*, which in 1209 or 1210 was sent to the University of Bologna to serve as an update on Gratian's *Decretum*, to be used in the teaching of canon law.⁴ The same thing happened in 1234, when Pope Gregory IX (1227–1241) sent a new and updated collection of papal decretals to the universities in Bologna and Paris entitled *Liber Extra* with instructions that this collection was to provide the basis for teaching in those places in future.⁵

⁴ Knut Wolfgang Nörr, "Die kanonistische Literatur", ed. H. Coing, *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte I* (München, 1973), pp. 365–397, esp. 365–367. The five collections are published in *Quinque compilationes antiquae, nec non collectio canonum Lipsiensis ad librorum manu scriptorum fidem recognovit et adnotatione critica instruxit Aemilius Friedberg* (Lipsiae, 1879–81; repr. Graz, 1956) [hereafter *Comp.*].

⁵ *Liber Extra* is published in *Corpus Iuris Canonici II: Decretalium collectiones*, ed. Lipsiensis secunda post Aemilii Ludovici Richter curas, ad librorum manu scriptorum et

The Universities and Legal Education

The newly established universities were central factors in the development of both canon and secular law. The latter underwent great changes during this period as a consequence of the emerging establishment of European territorial states. The universities met many contemporary needs, amongst them the need for qualified secular and ecclesiastical administrators and a greater insight into Truth—that is, God’s plan for man. Against the foil of a rational, scholastic approach, such as the glossing of authoritative texts such as the Bible and the Roman *Corpus Iuris Civilis*,⁶ students were trained to think in new contexts and to conceive of new ways in which human society should to be constructed to ensure that everything agreed with God’s plan. There was a great drive to ensure that everything was identified and made to agree with the plan God had to have for man, and such knowledge became an advantage in all walks of life. Knowledge thus became a way to achieve, extend and legitimise power. Thus, for teachers and students at universities, the achievement of knowledge and the method of achieving such knowledge, became a way to secure a steady income and considerable social status.⁷

Universities usually developed at sites where many people met or passed through and much capital was stored. An additional factor might be the existence of an already established school that attracted good teachers. The subject specialisms of individual universities were based on local demands for knowledge and the existence of an established faculty of teachers. Since teachers usually came from cathedral or notarial schools, most universities taught the liberal arts (*artes liberales*). The first level consisted of grammar, rhetoric and logic,

editionis Romanae fidem recognovit et adnotatione critica instruxit Aemilius Friedberg (Lipsiae, 1879–81), col. 1–928 [hereafter X].

⁶ *Corpus Iuris Civilis* is published in *Corpus Iuris Civilis I–III*, rec. Theodorus Mommsen, Paulus Krueger, Rudolfus Schoell and Guilelmus Kroll (Berlin, 1963–1966). The corpus consists of the *Institutiones* [hereafter Inst.], the *Codex* [hereafter Cod.], the *Digesta* [hereafter Dig.], and the *Novellae* [hereafter Nov.].

⁷ Walter Rüegg, “Themes”, ed. Hilde de Ridder-Symoens, *A History of the University in Europe I: Universities in the Middle Ages* (Cambridge, 2003), pp. 3–34; Jacques Verger, “Patterns” ed. Hilde de Ridder-Symoens, *A History of the University in Europe I: Universities in the Middle Ages* (Cambridge, 2003), pp. 35–74; Mia Münster-Swendsen, *Master and Paragons. Learning, Power, and the Formation of a European Academic Culture c. 900–1230* (unpublished PhD-thesis) (University of Copenhagen, 2004), pp. 1–180.

subjects that had been known as the *trivium* since antiquity. When a student had qualified in these subjects, he could devote himself to the more advanced mathematical scientific *quadrivium*: arithmetic, geometry, astronomy and music. The study of law took up an intermediate position between God-given nature and a rhetorical-logical discipline more closely associated with rhetoric.⁸ The later professionalization of law took place outside the liberal arts because law increasingly developed into a subject independent of the other sciences.

The growing status and influence of universities is illustrated by papal attempts to regulate advanced law: for example, as already mentioned, by sending the *Compilatio tertia* to the university in Bologna in 1209 or 1210, and by doing the same in 1234 by sending the *Liber Extra* to Bologna and Paris in order for these texts to provide the foundations for the future teaching of canon law.⁹ The same policy found expression in the fact that Pope Honorius III (1216–1227) issued the Bull *Super Speculum* in 1219 in which he prohibited the teaching of Roman law at the University of Paris, arguing that this kind of law was not used in France.¹⁰ Somewhat later, secular princes took the initiative to establish universities, although the University of Naples, founded in 1224—to which the Sicilian king Frederick II (r. 1198–1250) attempted to lure the greatest names in the teaching of Roman law from Bologna—was the only university founded in the thirteenth century.¹¹ The University of Naples taught both Roman and canon law and all the other common university subjects, but in order to secure the university's success, Frederick II uniquely prohibited his subjects from attending other universities.¹²

Bologna occupied a special position in the study of law. Its legal faculty became the prototype for other education in law during the Middle Ages, both with regard to the study of Roman law and for the most

⁸ Gordon Leff, "The Faculty of Arts", ed. Hilde de Ridder-Symoens, *A History of the University in Europe I: Universities in the Middle Ages* (Cambridge, 2003), pp. 307–336, esp. 308.

⁹ Paolo Nardi, "Relations with Authority", ed. Hilde de Ridder-Symoens, *A History of the University in Europe I: Universities in the Middle Ages* (Cambridge, 2003), pp. 77–107, esp. 82.

¹⁰ Stephan Kuttner, "Papst Honorius III. und das Studium des Zivilrechts", ed. E. von Caemmerer, *Festschrift für Martin Wolff. Beiträge zum Zivilrecht und internationalen Privatrecht* (Tübingen, 1952), pp. 79–101.

¹¹ Nardi, "Relations with Authority", pp. 86–96.

¹² Wolfgang Stürner, *Friedrich II. Teil 2: Der Kaiser 1220–1250* (Darmstadt, 2000), pp. 47–57.

up-to-date canon law. In Bologna the two subjects were given equal prominence while in Oxford, for example, Roman law was only an auxiliary to canon law, just as students in Paris after 1219 only studied Roman law in as far as it was an assimilated part of canon law.¹³

University teaching was usually conducted in Latin and it was not always easy for the students to understand and follow Latin texts. For this reason, we have vernacular translations of several Latin texts. Among these we find the so-called *ordines iudicarii* or *ordines iudiciorum*, which were systematic descriptions of every kind of procedure occasionally mentioned in their model and source of inspiration, the Corpus Iuris Civilis. The best of these *ordines*, however, come out of canon law,¹⁴ doubtless because canonists needed procedural law—the glossators, learned in Roman law, did not need to use procedural law since they studied a defunct legal system. Basically, the glossators commented upon a legal system that was no longer functioning in its entirety while the canonists commented on a legal system that was constantly changing.

The influence of Roman law upon medieval learned procedural law was so extensive and obvious that medieval learned procedural law has subsequently been characterised as Roman-canonical. That there was an increased focus on procedural law was undoubtedly related to the fact that it made legal science practically applicable—it gave the students a new tool to use when they entered the real world. In terms of teaching, this knowledge had to come from Roman law since canon law, even as late as the early thirteenth century, still had not developed a learned body of work that explained the practical technicalities that the students had to use. This work did not appear until Tancred's *Ordo iudiciarius* was published some time soon after the Fourth Lateran Council in 1215, possibly as a result of the increased focus on procedure and an increased need for its understanding.¹⁵

¹³ Antonio Garcia Y. Garcia, "The Faculties of Law", ed. Hilde de Ridder-Symoens, *A History of the University in Europe I: Universities in the Middle Ages* (Cambridge, 2003), pp. 388–408, esp. 388–389. On Paris, see Stephan Kuttner, "Some Considerations on the Role of Secular Law and Institutions in the History of Canon Law", ed. Stephan Kuttner, *Studies in the History of Medieval Canon Law* (Aldershot, 1990), pp. 351–362, esp. 354.

¹⁴ Garcia Y. Garcia, "The Faculties of Law", pp. 392, 396. See the survey in Linda Fowler-Magerl, *Repertorien zur Frühzeit der gelehrten Rechte. Ordo iudiciorum vel ordo iudiciarius (Ius Commune, Sonderhefte 19)* (Frankfurt a.M., 1984).

¹⁵ The work of Tancred is published in Pillius, *Tancredus, Gratia. Libri de iudiciorum ordine*, ed. Friedrich Christian Bergmann (Göttingen, 1842; repr. Aalen, 1965), pp. 87–314.

We do not know much about how many students attended university from the Nordic countries, but a count of the number of persons with a Masters degree in these countries shows that there were at least 75 individuals with this qualification in Denmark and somewhat fewer in other Nordic countries during the period. An analysis of the available figures from, amongst others, the University of Bologna in the last fifteen years of the thirteenth century shows the same distribution, while Paris seems to have attracted more Swedes than Danes. The relevant matriculation records also leave an impression that Nordic students were exceedingly wealthy in comparison to their fellow students. While most of the Nordic students seem to have aimed for a career in the Church, and, to a lesser extent, the royal administration (and perhaps even received some financial support from the Church) their relative wealth indicates that it was necessary for a Nordic student to have a certain level of financial independence in order to finance his studies so far from home.¹⁶ The matriculation records do not tell us what these students studied, but for most of them law must have played a part, particularly for those who studied in Bologna.

The Announcement of a New Era—Papal and Secular Law-giving

Law and legal learning developed rapidly in the High Middle Ages. This development was one amongst many, but corresponded to an increased institutionalisation of existing territorial kingdoms; an institutionalisation that resulted in a more hierarchical bureaucracy, both ecclesiastical and secular. It also created more formalised legal conditions. The period was thus characterised by a race between the secular and ecclesiastical to develop a theory about the power of man to legislate. This endeavour took place both as a support for and a culmination of the Church's effort to institutionalise the office of kings as a stabilising factor in society and the king as the just executor of law. Or, more precisely, the period was characterised by the competition between the two spheres to *gain* such legislative power. Both parties were frequently active in the same legal fields, since some crimes could be interpreted as both ecclesiastical and secular as a consequence of

¹⁶ See Sverre Bagge, "Nordic Students at Foreign Universities until 1660", *Scandinavian Journal of History* 9 (1984), pp. 1–29, esp. 2–13.

the fact that they transgressed the moral norms of the Church and destabilised secular society.

The ideological competition between church and king was caused by the fact that the parties were individually convinced that they had a special prerogative. This was most clearly expressed in the fact that Emperor Frederick II (r. 1220–1250) published a collection of laws for his Sicilian kingdom in the summer of 1231 (he was also the King of Sicily 1198–1250). Frederick II's Constitutions of Melfi provoked a strong reaction from Pope Gregory IX, not so much because of its content but more because of its underlying ideology. The prologue to the collection showed beyond a doubt how Frederick II perceived the duties of a secular prince. The Emperor explained how man—who had originally lived a good and morally sound life in Paradise under God's law (*lex dei*)—had disrupted Divine order and natural law (*ius naturae*) through his disobedience and therefore had to leave Paradise and suffer chaos and strife. To survive, it was therefore necessary for mankind to create its own legal order and thus one man was given more dignity and power than others—in other words, mankind subjected itself to a prince as the executor of law. Indeed, even the pagan Romans had accepted and institutionalised imperial rule and its unique power to pass new laws. Thus the secular prince was the one to lead sinful mankind back to the path of righteousness—the path to God's order. Thus, according to Frederick II the secular rule of princes was a God-given institution, which was intended to ensure the continued existence of God's norms amongst mankind by judging and combating evil amongst men and realising the justice of the Lord. To improve oneself in the eyes of God meant to obey the laws of the prince.¹⁷

It was this interpretation of the consequences of the fall of man that upset Pope Gregory IX. Until then, the function of the secular prince in the legal order had been to secure peace and justice (*pax et iustitia*) by preserving and making current law explicit, not to create new law. Now, Frederick II not only wished for the secular prince to be the protector of law, but also its originator: the king (or the emperor for that matter) was now to be not only the just prince (*rex iustis*) but also the creator of law (*legum conditor*). Previously, if the secular prince wished for the law to change, this could only be achieved slowly by changing

¹⁷ Wolfgang Stürner, "Rerum necessitas und divina provisio", *Deutsches Archiv für Erforschung des Mittelalters* 39 (1983), pp. 467–554.

practice, in legal sentencing, treaties and donations of privileges. But now, the word *lex* changed its meaning from preserved right to created law, which could now be initiated by the secular prince.¹⁸

It was this point that upset Gregory IX. In his opinion, the creation of new law was the privilege of the pope. This principle had been formulated in the eleventh century during the investiture struggle by the reforming pope Gregory VII (r. 1073–1085) in order to claim the pope's plenitude of powers (*plenitudo potestatis*). In other words, popes had reserved the power to pass new laws for themselves since the end of the eleventh century. According to Gregory VII, only the pope, the spiritual link between mankind and God, could lead mankind on the right path. Only the pope could realise God's justice and thus restore Divine order to man.¹⁹

This principle was firmly established in the century following Gregory VII as canonists elaborated the concept *ius positivum*—positive law—which signified law promulgated by the human law-giver embodied in the pope. When Gregory IX sent the *Liber Extra* to the universities in Bologna and Paris in 1234 the publication also signalled the pope's right to pass new laws.²⁰ Like Frederick II had done in the Constitutions of Melfi, in his prologue to the *Liber Extra* Gregory IX took his starting-point in the story of the Fall to explain the connection between God and legislative power. But he gave different reasons why mankind should follow certain humanly ordained laws. Gregory explained that God, in His mercy, had originally arranged it so that His subjects were chaste, peaceful and honest, but after the Fall unrestrained desire created new conflicts: unless justice (*iustitia*), with its virtue, goodness and strength, could once again restrain this desire, the breaking of the pact between mankind and God (the *ius humani foederis*) would destroy the peace. Therefore, laws were made in order to limit harmful appetites so that men could be brought up to give

¹⁸ Hermann Krause, *Kaiserrecht und Rezeption* (Heidelberg, 1952), pp. 18–20, 34–38, 47–48 and 145–146.

¹⁹ *Monumenta Germaniae Historica* [hereafter MGH]. *Epistolae Selectae* 2.1: *Das Register Gregors VII*, ed. Erich Caspar (München, 1920), 203: "Quod illi soli licet pro temporis necessitate novas leges condere..."

²⁰ Kenneth Pennington, "Law, legislative authority and theories of government, 1150–1300", ed. J.H. Burns, *The Cambridge History of Medieval Political Thought c. 350–c.1450* (Cambridge, 1997), pp. 424–453, esp. 425–426. Basically Sten Gagnér, *Studien zur Ideengeschichte der Gesetzgebung* (Acta Universitatis Upsaliensis. Studia Iuridica Upsaliensia 1) (Uppsala, 1960); for the Constitutions of Melfi, see pp. 341–366.

everyone their due right and to live honestly.²¹ However, Gregory pointed out that conflicting official and unofficial collections of law create confusion amongst men and therefore the one who is closest to God—that is the pope (although it actually was done by Raymond of Penyafort)—edited the present collection and removed all that is superfluous. Thus, Gregory explicitly prohibited anyone from promulgating law without a special apostolic permission in the introduction to the *Liber Extra*.²²

Gregory also declared that in future the *Liber Extra* was to be the foundation of all teaching and legal practice. He was, in principle at least, legislating for the future and not just collecting together existing law.²³ Gregory's collection of decretals thus seems to have been a response to the conclusions Frederick II drew from the story of the Fall. These had undermined the unique position of the Church as law-giver because the Sicilian king claimed that, in the secular sphere, he, as king, could interpret God's will as well as the pope could. Frederick II justified this conclusion with references to Roman law, which gave the emperor a special, exalted role, and he also referred to contemporary theories that placed the emperor and the king on an equal level. Although he was Emperor, Frederick II could not base any claim to authority in Sicily because on that island he was king of an independent kingdom. Therefore he justified himself by reference to the twelfth-century idea that *rex imperator in regno suo*, that the king is the emperor in his own kingdom, in other words, that the king could rule over his kingdom in the same way that the emperor ruled over the empire.

Originally this was an argument that the Church had used in its opposition to the empire, and therefore by the early thirteenth century the doctrine was not only fully accepted amongst theologians but also very popular in the secular sphere: legal advisors of kings and the members of the educated elite were predominantly clerics and therefore they would have been familiar with this doctrine.²⁴ The advantage

²¹ This is repeated word by word in the prologue to the Danish Law of Jylland.

²² X, pp. 3–4: "...prohibemus, ne quis praesumat aliam facere absque auctoritate sedis apostolicae speciali."

²³ Knut Wolfgang Nörr, "Die Entwicklung des Corpus Iuris Canonici", ed. H. Coing, *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte I* (München, 1973), pp. 835–846, esp. 841–843.

²⁴ See Wolf, *Gesetzgebung in Europa*, pp. 19–20 for examples. On legal trained persons in the royal administration, see Gagnér, *Studien zur Ideengeschichte der Gesetzgebung*, pp. 324–341.

for the king was that, in theory at least, this doctrine gave him an unprecedented sovereignty over his territory. In turn, this provided the foundation for an entirely new form of centralised power and, as a concomitant, an increased authority. Frederick II claimed this authority and argued that the king received his power directly from God. Therefore he was His immediate representative on earth—thus making royal legislation possible throughout the kingdom without the Church's interference—at least in theory. Thus the Constitutions of Melfi were the first step away from a theologically founded, eternal, Divine natural law that God, according to medieval legal scholarship, had formulated in His creation so that man could identify and carry it out. The Constitutions of Melfi was the beginning of that modern legal positivism that separates the law from morality and religion, and where law is perceived as something that can be changed by concrete decisions that follow predetermined formal procedures.²⁵

In the following centuries, many European kingdoms followed Frederick's lead and published centrally composed, comprehensive, official compilations of laws. These were either based on new legislation or marked the fact that the king had recognised a particular codification of law. Thus, throughout the thirteenth and fourteenth centuries, we can almost talk about a wave of codification and legislation. In reality, it is difficult to distinguish between the two types of law—new legislation or the acknowledgement of older law—because the larger collections of law often combined new and old law, and in many instances new law was legitimised by claiming to be rediscovered old law. In other instances, the king merely referred to the theory of the *ius positivum*, which in reality meant that he, as the king, could legislate within the bounds of his own kingdom.²⁶

There are many reasons behind secular legislation in the thirteenth century and they can only be explained if we see the development as a culmination of many phenomena that found their expression in the idea of the secular right to legislate. A contributing factor was undoubtedly the fact that an increasingly self-conscious Church challenged the power of secular princes, and in doing so provoked a secular response. At the same time the increasing complexities of society demanded that

²⁵ Gagnér, *Studien zur Ideengeschichte der Gesetzgebung*, pp. 15–120.

²⁶ Ditlev Tamm, "Mæth lagh skal land byggæs. Betrachtungen zur Rechtsauffassung des Mittelalters mit besonderen Hinblick auf nordische und spanische Rechtsquellen", ed. Karl Kroeschell, *Festschrift für Hans Thieme zu seinem 80. Geburtstag* (Sigmaringen, 1986), pp. 127–141. See also Andersen, *Rex imperator in regno suo*.

those in power rearrange and restructure society in a new, purposeful way in order to make it more efficient.²⁷ One way to achieve this goal was to permit the king to occupy a more well-defined and more active role as leader in society. This could be done, for example, by emphasising the expectation that the ruler would be the guarantor of sanctions against breaches of the peace.²⁸ An additional development was that European universities were spitting out more trained lawyers every year. These often found themselves unable to use their knowledge unless their peers recognised the fact that this new training could be used constructively. Those who trained at university thus needed to create networks that secured *their* future income; thus they exhibited a certain amount of self-interest in promoting an ideology that could be used by individual kings to extend or cement their authority.

Learned Procedural Law at the Beginning of the Thirteenth Century

The first half of the thirteenth century must be characterised as a time of revolution in the context of legal history: this was a period in which several of the abovementioned developments established themselves as core. These new principles included the common European understanding of law promulgated by the Church and the universities; the knowledge of the power of ‘giving’ or promulgating the law; the ideology of the king as the lawgiver in his own kingdom; the Papacy’s emphasis on his God-given right to legislate for the secular sphere; and the rational, problem-oriented, scholastic, analytic approach to the source of law.

These principles took concrete form, either in royal legislation or in canon law. As a rule, this development took place first in canon law since, on one hand, this was more intimately associated with the tradition of learned law and, on the other, the development was a result of the fact that the Church, to a much larger extent than individual kings, had its own learned environment in which new principles of law and ideas about concrete changes to the administration of justice could be

²⁷ R.W. Southern, *Scholastic Humanism and the Unification of Europe I: Foundations* (Oxford, 1997), pp. 283–284.

²⁸ Armin Wolf, “Gesetzgebung und Kodifikation”, ed. P. Weimar, *Die Renaissance der Wissenschaften im 12. Jahrhundert* (Zürich, 1981), pp. 143–171, esp. 160–161. We find this idea expressed in for example the prologue to the Danish Jyske Lov.

formulated. The ideas concerning the administration of justice which were a characteristic of the ecclesiastically oriented learned legal thinking in these decades were most succinctly expressed in the decisions of the Fourth Lateran Council held in the Lateran Palace in Rome in the last months of the year 1215.²⁹ Although the Fourth Lateran Council played a concrete role in the development of law because of the decisions it took in the matter of procedural law, many of the decisions of the Council only became general knowledge when Gregory IX promulgated his collection of decretals in 1234; actually, only three decisions of the council were not included in the *Liber Extra*.³⁰

The decisions of the Fourth Lateran Council signalled a change of direction in law. This was not least the case for procedural law, where it marked the culmination of several long developments. Two particular developments reached a conclusion in the months immediately following Pope Innocent III's opening speech to the Council on 11th November 1215: firstly, the Council prohibited clerics' participation in judicial trials by ordeal and secondly it introduced inquisitorial procedure at ecclesiastical courts. In addition, it demanded that every case be documented in writing so that in future it would be possible to prove a correct interpretation of the case against a weighing of the evidence produced.³¹

²⁹ For the decisions from the Fourth Lateran Council, see *Dekrete der ökumenischen Konzilien II: Konzilien des Mittelalters vom ersten Laterankonzil (1123) bis zum fünften Laterankonzil (1512–1517)*, ed. Josef Wohlmuth (Paderborn, München, Wien and Zürich, 2000), pp. 227–271 [hereafter Lat. IV].

³⁰ The *canones* not included in *Liber Extra* were c. 42, c. 49 and c. 71. None of these contained rules on legal procedure. Canon 71 contains the date for the next crusade to The Holy Land: June 1217.

³¹ See Lat. IV, c. 18, c. 8, c. 38. Richard M. Fraher, "IV. Lateran's Revolution in Criminal Procedure: the Birth of Inquisitio, the End of Ordeals, and Innocent III's Vision of Ecclesiastical Politics", ed. Rosalio I. Castillo Lara, *Studia in honorem Eminentissimi Cardinalis Alphonsi M. Stickler* (Pontificia studiorum universitas Salesiana. *Studia et textus historiae iuris canonici* 7) (Rome, 1992), pp. 97–111, thinks that the abolition of ordeals, the introduction of the inquisitorial and the introduction of the written procedure were part of a major plan to get the penal law under the Church's control; this is rejected convincingly by Lotte Kéry, "Aspekte des kirchlichen Strafrechts im *Liber Extra* (1234)", eds. Hans Schlosser and Dietmar Willoweit, *Neue Wege strafrechtsgeschichtlicher Forschung* (Konflikt, Verbrechen und Sanktion in der Gesellschaft Alteuropas. Symposien und Synthesen 2) (Köln, Weimar and Wien, 1999), pp. 241–297, esp. 276, n. 120. See also R.C. van Caenegem, "Methods of Proof in Western Medieval Law", ed. R.C. van Caenegem, *Legal History. A European Perspective* (London, 1991), pp. 71–113.

Although these developments had begun as early as the ninth century and only became standard practice in the fourteenth century, the new formal rules decided in the Fourth Lateran Council marked a change in paradigm in ecclesiastical procedural law. The Church finally distanced itself from previous rules that had insisted on evidence that was presumed to reveal the will of God. These so-called ‘ordeals’ or ‘sentences by God’ could basically be revealed in the following ways: that the accused or suspect was tied up and lowered into cold water to see whether they floated to the surface and thus were innocent; that the accused or suspect walked upon or carried red-hot iron to see whether they were marked by it; that the accuser and the accused fought a judicial duel in which God let the party who spoke truth win; or that the accused or the suspect could swear to his innocence himself or produce an oath supported by a predetermined number of oath-helpers who swore to the good reputation and trust-worthiness of the accused rather than the issue at hand.³²

The Council’s 1215 rejection of ancient methods of proof forced the secular legal systems to find other ways of judging serious crimes. Spectacular methods of proof such as the carrying of hot irons had been an effective means of conversion of pagans to Christianity and an important procedural element in the popular movement for the Peace of God, which had laboured since the tenth century to secure peaceful co-existence in Christian areas.³³ But now, time had run out for such methods of proof.

There were several reasons behind this development. Firstly, societies had become more socially complex and differentiated. Such means of proof had been introduced in the ninth century in the Carolingian Empire, but during the twelfth and thirteenth centuries it became more difficult or even irrelevant, to use Divine judgement as a means of creating consensus or as an expression of the principle that God would protect society against chaos. Paul Hyams suggests that, previously, when communities were based on face-to-face communication,

³² For the different forms, see Bartlett, *Trial by Fire and Water*, pp. 13–33.

³³ Hans-Werner Goetz, “Protection of the Church, Defense of the Law, and Reform: On the Purposes and Character of the Peace of God, 989–1038”, eds. Thomas Head and Richard Landes, *The Peace of God. Social Violence and Religious Response in France around the Year 1000* (Ithaca and London, 1992), pp. 259–279; R.I. Moore, “Postscript: The Peace of God and the Social Revolution”, eds. Thomas Head and Richard Landes, *The Peace of God. Social Violence and Religious Response in France around the Year 1000* (Ithaca and London, 1992), pp. 308–326.

such means of proof had contributed to the creation of a sense of community, but that the more depersonalised forms of communication that developed in the High Middle Ages made such manifestations unnecessary.³⁴ Even though such a functional explanation of ritual may be questioned,³⁵ we cannot reject the argument that increasing social stratification in the twelfth and thirteenth centuries affected an increased awareness of who should produce Divine judgment and who should not.

Secondly, the Gregorian reform movement's and its supporters' aim to create a more distinct separation between ecclesiastical and secular jurisdiction probably played a role. If clerics did not bless the proceedings, the foundations for Divine judgement disappeared.³⁶

Thirdly, throughout the twelfth century there had been mounting scepticism amongst intellectuals against Divine judgement as proof. Several theologians pointed out that such trials had not been authorised by God but were instituted by man. They also argued that to imagine that man could force Him to manifest His will at a given time as part of the judicial process was a denial of the Grace of God.³⁷ The *Liber Extra* used this kind of argument to support the separation of penal law into a distinct area of law where publicly committed crimes could be sentenced by men while God dealt with hidden crimes committed in a clandestine manner at a time He found convenient.

Fourthly, the increased study of the principles of Roman law embodied in the *Corpus Iuris Civilis*, forced canonists to argue that the accused was innocent until proven guilty. Thus, they departed from the concept of negative proof where the accused had to prove his innocence—now it became the accuser who needed to prove his accusations (which was termed 'positive' proof).³⁸ Thus Divine judgement

³⁴ See Paul R. Hyams, "Trial by Ordeal: The Key Proof in the Early Common Law", eds. Morris S. Arnold, Thomas A. Green, Sally A. Scully and Stephen D. White, *On the Law and Customs in England. Essays in Honor of Samuel E. Thorne* (Chapel Hill, 1981), pp. 90–126.

³⁵ See Bartlett, *Trial by Fire and Water*, pp. 34–69.

³⁶ See Lat. IV, c. 18: "...nec quisquam purgationi aquae ferventis vel frigidae seu ferri candentis ritum cuiuslibet benedictionis aut consecrationis impendat..." Also Mathias Schmoeckel, "'Ein sonderbares Wunderwerck Gottes'. Bemerkungen zum langsamen Rückgang der Ordeale nach 1215" (*Ius Commune*, Sonderhefte 26) (Frankfurt a.M., 1999), pp. 123–164.

³⁷ Bartlett, *Trial by Fire and Water*, pp. 70–102.

³⁸ See Richard M. Fraher, "'Ut nullus describatur reus prius quam vincatur': Presumption of Innocence in Medieval Canon Law", eds. Stephan Kuttner and Kenneth

could no longer be trusted because its underlying principle was that the accused proved his innocence by being subjected to an ordeal in which the proof automatically produced a decision (which is the reason why German legal historians have characterised this kind of legal decision as ‘sentence by proof’, *Beweisurteil*).

Fifthly, the old system of proof based on Divine intervention and oath-helpers gave the defendant strong control over the outcome: on the one hand, it was the accused who chose his fellow oath-helpers, and on the other hand there was a reasonable chance that the outcome of the Divine intervention would be beneficial for the defendant.³⁹ A list of the outcomes of 308 cases from early thirteenth-century Novgorod shows that in 130 cases the accused proved his innocence and only failed to do so in 78 cases. In 25 cases the accusation was retracted before performance of the proof, while 75 cases were determined by an agreement between the accused and his accuser.⁴⁰ Such a large ‘success rate’ probably also meant that some people who were in actual fact guilty were let off, and this probably did not fit well with the Church and its attempts to combat human sin.

Regardless of the reasons behind the rejection of this kind of proof, the decision of the Fourth Lateran Council led to an acute need for new ways to settle legal disputes. This was not least the case for secular rulers; when the Church no longer supported the old methods of proof, the argument that they were the just judgement of God became problematic (although one could argue that, actually, the non-participation of the clergy meant that God simply could—or should—be present in these kinds of proof).

Generally speaking, the need for new methods of proof and new institutions to determine these proofs, seems in many regions of Europe to have been answered by an increased use of juries, which

Pennington, *Proceedings of the Sixth International Congress of Medieval Canon Law* (Monumenta iuris canonici: Series C, Subsidia 7, S. Congregatio de Seminariis et Studiorum Univ.) (Rome, 1985), pp. 493–506.

³⁹ Margaret H. Kerr, Richard D. Forsyth and Michael J. Plyley, “Cold Water and Hot Iron: Trial by Ordeal in England”, *Journal of Interdisciplinary History* 22 (1992), pp. 573–595, gives a physical explanation.

⁴⁰ See van Caenegem, “Methods of Proof in Western Medieval Law”, p. 76. For the same numbers in England, see Kerr, Forsyth and Plyley, “Cold Water and Hot Iron”, and for France, see Stephen D. White, “Proposing the Ordeal and Avoiding It: Strategy and Power in Western French Litigation, 1050–1100”, ed. Thomas N. Bisson, *Cultures of Power. Lordship, Status, and Proces in Twelfth-Century Europe* (Philadelphia, 1995), pp. 89–123.

now often were a permanent group of chosen men or of men sworn in for the purpose representing the community. These men were charged with the task of either finding the truth in cases by weighing the evidence produced or to present the community's opinion of the matters disputed to a judge. Locally based juries are known to have existed in several places by the twelfth century, but it is very typical for these institutions that their development culminated during the thirteenth century. In England development culminated in the years 1218–1222 when it was determined that, in reality, royal judges were just to confirm the conclusions reached by a locally based jury. The explanation behind this was that the members of the jury, with their local knowledge, probably knew more about the true facts than the royal judge. Thus the juries' base in the local communities was said to be especially important because through the jury the local community came together in support of a particular decision in a legal dispute. In the final analysis such consensus was necessary if the king was to be the protector of the law in reality—and not just ideologically.⁴¹ In addition, juries also secured the consensus which had been one of the features of the old Divine judgement.

The rejection of the judgement of God did not have the same immediate consequences for the legal order of the Church. This, of course, was related to the fact that the carrying of hot irons could rarely be used in cases that fell under ecclesiastical jurisdiction. An additional factor was that the Church developed a new legal procedure, particularly during the reign of Innocent III (1198–1216) and this inquisitorial process was included in Canon 8 of the Fourth Lateran Council.

Previously, the dominant procedure had been accusatory, in which one party pursued another (which later became characteristic for the civil procedure exclusively). Under this form of procedure it was the role of the judge to secure the fulfilment of fixed proof so that an already defined punishment could be executed. The inquisitorial procedure had a different starting-point, namely that the Church wished for the judge to investigate the truth, not simply to become convinced about blame based on meeting some fixed demands of proof.⁴² Thus

⁴¹ See Roger D. Groot, "The Early-Thirteenth-Century Criminal Jury", eds. J.S. Cockburn and T.A. Green, *Twelve Good Men and True. The Criminal Trial Jury in England, 1200–1800* (Princeton and New Jersey, 1988), pp. 3–35.

⁴² Later on this was pinpointed in Liber Extra, see X 5.1.19, X 5.1.21 and X 5.3.31. Basically Winfried Trusen, "Der Inquisitionsprozess. Seine historischen Grundlagen

the aim was not simply to decide between a plaintiff and a defendant, but to uncover whether a crime had been committed at all and who had perpetrated it. While the accusatory process depended on the judge's weighing of the evidence produced by the two parties, the new ecclesiastic procedure now meant that the judge had the right to pursue a case on his own if he suspected a transgression, and also that he could question not only the parties involved but also possible witnesses in order to establish the truth in the matter. The development of the inquisitorial procedure was thus related to the fact that the burden of proof to an increasing degree rested on the plaintiff, who now had to positively prove his case against the defendant. Thus there was a greater emphasis on proof of particular elements of the case rather than the trustworthiness of the parties involved.⁴³ Therefore, personal depositions, written documents and confessions became more important in ecclesiastic and later secular contexts, and if necessary such proof to be extracted under torture.

The acceptability of torture owed itself to the fact that, during the High Middle Ages, there was an increased emphasis on confession as full proof. Even though this kind of proof had been known in the *Corpus Iuris Civilis*, the discussion of guilt amongst the learned theologians and canonists meant that confession became more prominent in the hierarchy of proofs because the confession of sin was the first step to the remission of sin. In addition, in its drive to make the legal system more efficient from the end of the twelfth century, the Church emphasised the post-Classical summary procedure as a particularly good way of making the system work. Short time spans, a limited possibility of objections and a short time frame within which to produce a case and proof, which sped up an otherwise often slow and cumbersome accusatory process were characteristics of the summary procedure, and, in the opinion of the Church, this counteracted the tendency of a legal dispute to last too long. One of the methods for increasing efficiency was focusing on a confession from the defendant or the introduction of the idea of notorious crime, that is, that the case was so self-evident

und frühen Formen", *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* [hereafter ZSR], *Kan. Abt.* 74 (1988), pp. 168–230.

⁴³ Wiesław Litewski, *Der römisch-kanonische Zivilprozess nach den älteren ordines iudicarii*, transl. Leon Głowacki (Kraków, 1999), came to my knowledge after finishing the manuscript and thus I have not been able to refer to this excellent work. Thank you to Peter Landau who pointed this study out to me.

that the defendant could be judged on existing proof without further process.⁴⁴ These kinds of ideas sometimes provided real (and formal) deviation from the canonical demand for two witnesses as full proof in return for the acceptance of the fact that a defendant could be judged on circumstantial evidence alone in cases where the judge was already convinced that the defendant was guilty.⁴⁵ In other words, the desire to make the process more effective and simultaneously uncover the truth underpinned the development of inquisitorial procedure.

Summary

At the beginning of the thirteenth century, many developments combined in decisive ways to change the learned law. The Church and the royal powers of Europe underwent a previously unseen institutionalisation, both in real power politics and in ideology. Learning blossomed across the continent as universities developed out of existing cathedral schools or were founded in towns that had become centres of financial and intellectual interaction. There had been a sustained increase in social stratification as a consequence of a growing population and increased economic activity. As a consequence, a distinctive common European understanding of the nature of law and how law should reach its decisions developed. The starting-point for the learned understanding of law—of the *ius commune*—was this period's synthesis of the Classical inheritance, the Roman law as it survived in the *Corpus Iuris Civilis*, and a canon law focused on morals and ethics, in collections of law, such as the first and second edition of Gratian's *Decretum* from the 1150s and the *Liber Extra* from 1234.

At the beginning of the thirteenth century, new power politics and ideological currents meant that procedural law developed quickly, informed by a new scientific learning at universities and the Church's wish for a more objective, and thus more just, law. The introduction of inquisitorial procedure and the prohibition against clerical participation in Divine judgements, which were both included as basic principles

⁴⁴ See Göran Inger, *Das Geständnis in der schwedischen Prozessrechtsgeschichte* (Rättshistoriskt Bibliotek 26) (Lund, 1976), pp. 17–46; Langbein, *Torture and the Law of Proof*, pp. 4–8.

⁴⁵ Richard M. Fraher, "Conviction According to Conscience: The Medieval Jurist's Debate concerning Judicial Discretion and the Law of Proof", *Law and History Review* 7 (1989), pp. 23–88.

in the decision of the Fourth Lateran Council in 1215 played a major part in this development. The prohibition against Divine judgement forced the appearance of new procedural forms in secular law since they were the courts that used Divine judgement most frequently.

Thus the state of society and of law was turbulent, complex and, for many, probably also incomprehensible, in the decades after the Fourth Lateran Council. This was also the reason why some European kings in the decades after 1215 started to legislate for their kingdoms. Amongst these we find the Danish King Valdemar II who promulgated the Law of Jylland in 1241.

In the following, the Law of Jylland and the other Danish provincial laws are to be further investigated with regard to their institutions and procedural law. These laws will be studied not for what they can tell us about contemporary practice (because they cannot be made to yield much information about this), but because they may reveal something about the Danish normative procedural answer to a concrete legal problem. Thus the Danish provincial laws, as relics of the past, can reveal information about their origin and a possible common European understanding of the nature of law and its substantial content; about the reception of the *ius commune* and its influence on secular law in medieval Denmark.

I will take as my starting-point the development of secular law at the beginning of the thirteenth century as the manifestations of contemporary ideologies of law and legal principles that were conceived and communicated from a learned cultural centre which had to be transformed to fit local conditions in the geographical parts of Europe which current scholarship often regard as peripheral. This was done partly in order to secure the law's success, partly in order to make it operational in its interaction with established societal structures. The determining criterion for the development of law and its legal centres and peripheries in the secular sphere in the High Middle Ages is thus assumed to be the ability to communicate and transform new and useable legal ideas in such a way that it might become possible to implement them in legal practice.

PART ONE

LEGAL INSTITUTIONS AND PROCEDURES
OF THE PROVINCIAL LAWS

CHAPTER FOUR

THE DANISH PROVINCIAL LAWS

Although twelfth-century chronicles mention legislation on particular subjects, it is doubtful that the laws mentioned in these chronicles were laws in the modern sense of the word.¹ Therefore the first Danish written law seems to date from 1170, namely the so-called Arvebog & Orbodemål (The Book on Inheritance and Heinous Crimes), one of the so-called ‘*landskabslove*’, i.e. provincial laws.²

Previously legal historians have assumed that The Book on Inheritance and Heinous Crimes was the first version of Valdemar’s *Sjællandske Lov* (Valdemar’s Law for Sjælland) since the latter, in addition to including the same rules as The Book on Inheritance and Heinous Crimes, mainly is similar in terms of structure and dialect and contains a number of rules supplementary to The Book on Inheritance and Heinous Crimes. However, some decades ago the Danish legal historian Ole Fenger, basing himself on linguistic analyses and a single entry in the *Annals of Ryd* that “the laws of the Danes” were issued in 1170, suggested that The Book on Inheritance and Heinous Crimes was not a law for one province, but rather that it had been valid for the

¹ Helle Vogt, “The King’s Power to Legislate in Twelfth- and Thirteenth Century Denmark”, eds. Per Andersen, Mia Münster-Swendsen and Helle Vogt, *Law and Power in the Middle Ages. Proceedings of the Fourth Carlsberg Academy Conference on Medieval Legal History 2007* (Copenhagen, 2008), pp. 1–10, esp. 3–4. See also Holberg, *Dansk og fremmed Ret*, pp. 193–194, and Christensen, *Kongemagt og Aristokrati*, pp. 24–26. The dating of the different provincial laws is also discussed—in some cases with some slightly dissimilar dates—by Vogt, *The Function of Kinship in Medieval Nordic Legislation*, pp. 64–73.

² All Danish provincial laws are published in *Danmarks gamle Landskabslove med Kirkelovene*, 8 vol. (with supplement to vol. IV), gen. eds. Johs. Brøndum-Nielsen and Poul Johs. Jørgensen (Copenhagen, 1933–1961) [hereafter DGL]. The provincial laws and the Church laws for Sjælland and Skåne are translated into modern Danish in *Danmarks gamle Love på Nutidsdansk*, 3 vol., eds. Erik Kroman and Stig Iuul (Copenhagen, 1945–1948) [hereafter DGLN]. The Centre for Scandinavian Studies at the University of Aberdeen is currently coordinating a translation into English of all Scandinavian laws, planned for publication in 2015.

Text 1 of Arvebog & Orbodemål can be found in vol. VII of *Danmarks gamle Landskabslove med Kirkelovene* (Copenhagen, 1942), pp. 1–119 [hereafter A & O]. A & O and its previous scholarly literature is treated more extensively in Andersen, *Lærd ret og verdslig lovgivning*, pp. 75–87.

entire kingdom.³ Fenger argued that this was the only way to interpret the reference to the 'Danes'.⁴ Since then, legal historians have added more circumstantial evidence in support of the idea that The Book on Inheritance and Heinous Crimes was written down to be a law for the entire kingdom, and it is suggested that the process happened in at least two distinct stages: on the one hand in connection with a thorough revision of inheritance custom in 1170, resulting in The Book on Inheritance, and on the other hand in connection with the regulation of violence, which appears to have been the result of a meeting between Danish magnates and King Canute VI in 1184 which probably resulted in The Book on Heinous Crimes.

The thesis is that the writing down of The Book on Inheritance was most likely the result of a collaboration between King Valdemar I, the Church and the magnates in which the king secured precedence for his son's precedence to the throne: this would mean that royal succession in the blood-line to the throne took over from the previous tradition of elective kingship (but later developments in the thirteenth and fourteenth centuries seem to go against this principle). This development took place in return for the introduction of the Roman law principle that a certain proportion of inheritance was left for kin, according to the rules outlined by canon law since St Augustine. The canon law thus secured the economic foundations of the nobility's power across generations and this was in contrast to the previous situation where it was probably possible to dispose freely of property.⁵

The same kind of compromise seems to have been reached with regard to the regulation of force found in The Book on Heinous Crimes: that is, in instances where crimes could not be settled with a fine but

³ DMA, p. 166: "Leges Danorum edite sunt." For a discussion of linguistic problems in translating the text, see Andersen, *Lærd ret og verdslig lovgivning*, p. 75, n. 1. The Annals of Ryd may have the wrong date, see Gelting, "Pope Alexander III and Danish Laws of Inheritance", p. 91, who suggests the date 1169.

⁴ Ole Fenger, "Jydske Lov og de øvrige danske landskabslove", eds. Ole Fenger and Chr. R. Jansen, *Jydske Lov 750 år* (Viborg, 1991), pp. 37–50, esp. 47.

⁵ See Vogt, *The Function of Kinship in Medieval Nordic Legislation*, pp. 175–183, and Gelting, "Pope Alexander III and Danish Laws of Inheritance". Gelting, "Odelsrett—lovbydelse—bördsrätt—retrait lignager", provides further support for this argument. For another result concerning England, see M.M. Sheehan, *The Will in Medieval England. From the Conversion of the Anglo-Saxons to the End of the Thirteenth Century* (Toronto, 1963). Gelting "Pope Alexander III and Danish Laws of Inheritance", pp. 101–103, tentatively suggests that the last 14 chapters of the *Arvebog* were added at a later date because they do not fit into the systematic program of the *Arvebog*.

carried a sentence of outlawry. The occasion for the new regulation of force—which was presumably accepted at a meeting between the king and “a mighty gathering of the most noble men of the realm on [the island of] Samsø...in order [amongst other things] to improve the civil law”⁶—was probably a recently suppressed revolt in Skåne that had demonstrated the need for a proper legal and criminal procedure:⁷ a procedure and criminal law that was both known and accepted by everyone and a means of prevention of violence which would enable the preservation of public order in the future. Such a compromise served the interests of all major groups in society: the magnates, who already had resources; the Church, which thus gained a significant means of securing peace; and the king who, in his role as the guarantor of law, was given the right to partake of the income from fines.

However, *if* it was the case that the new sparse rules in the compiled Book on Inheritance and Heinous Crimes reflected a desire or an attempt to legislate for the entire kingdom as one, such unity seems to have ended when the same King Canute issued an ordinance on manslaughter for the province of Skåne in the year 1200.⁸ This ordinance declares that it was composed because the people of Skåne were more often afflicted by the crime of homicide than other inhabitants of the kingdom. In order to curtail this evil, the punishment for murder was increased in that part of the kingdom. This assertion is reflected in the fact that several of its rules are clearly more severe than the previous legislation contained in The Book on Heinous Crimes.

One of the consequences of Canute VI's Ordinance on Manslaughter was that the criminal law that was enforced across the entire kingdom by the rules contained in The Book on Heinous Crimes was set aside, at least in the province of Skåne. After Canute's proclamation, the administration of justice became regional to a larger extent. Indeed, this may previously have been the case since criminal law and the law of inheritance were only a minor part of contemporary law, and these laws must have been in existence and applied in addition to the rules

⁶ Saxo Grammaticus, *Gesta Danorum—Danmarkshistorien*, 2 vol., ed. Karsten Friis-Jensen and transl. by Peter Zeeberg (Copenhagen, 2005) [hereafter Saxo], vol. 2, book 16, ch. 4, § 2, p. 520: *Apud insulam deinde Samsam non solum huius negotii explicandi, sed etiam iuris ciuilis emendandi gratia ingenti nobilitate contracta amborum legatos excepit.* The reference to ‘iuris ciuilis’ must refer to non-military laws.

⁷ See Andersen, *Lærd ret og verdslig lovgivning*, pp. 82–85.

⁸ DD 1:4:24. See Andersen, *Lærd ret og verdslig lovgivning*, pp. 85–87.

found in *The Book on Inheritance and Heinous Crimes*.⁹ So it makes more sense to say that *The Book on Inheritance and Heinous Crimes* and the law that had been fixed in writing were exceptional at the end of the twelfth century. Thus it is the exception rather than the rule that we can speak of common or similar rules across regional boundaries, that is rules for the entire kingdom. It is therefore not surprising that there was a development and compilation of collections of law for each of the three main regions, Skåne, Sjælland and Jylland, in the following centuries.

In many cases these rules were inspired by the same ideological currents or were directly influenced by each other when dealing with new problems and current political conditions. This undoubtedly partly explains why so many of the rules appear to be so similar. However, there is also a more concrete exchange and mutual inspiration behind the fact that a large part of the rules of thirteenth-century provincial laws are more or less similar, word for word. Many of these rules must have been transferred from one collection of laws to another, especially from *Skånske Lov* (the Law of Skåne) to *Valdemar's Law* for Sjælland and the *Law of Jylland* (*Jyske Lov*).

It looks as if it was the inhabitants of Skåne who first received a new and comprehensive law book, possibly because this was the part of the kingdom that was most frequently disturbed and characterised by a disagreement about what was valid law. In several places, the collection later known as the *Law of Skåne* testifies that there was an apparent disagreement between the king and the men of Skåne that could impact on a decision concerning what was valid law because occasionally there are phrases that can be paraphrased as 'the king thinks this and most people in Skåne think that', etc.¹⁰

What occasioned the writing down of the *Law of Skåne* must without a doubt be found in the already mentioned fact that at the Fourth Lateran Council in 1215 the Church prohibited clerical participation in Divine Judgement. This was such a fundamental intervention

⁹ See Helle Vogt, "Secundum consuetudinem et leges patrie: The Concept of Law and Custom in Thirteenth Century Denmark", eds. Per Andersen and Mia Münster-Swendsen, *Custom. The Development and Use of a Legal Concept in the Middle Ages. Proceedings of the Fifth Carlsberg Academy Conference on Medieval Legal History 2008* (Copenhagen, 2009), pp. 67–87.

¹⁰ Text 1 of *Skånske Lov* can be found in vol. I.1 of *Danmarks gamle Landskabslove med Kirkelovene* (Copenhagen, 1933) [hereafter SkL]. See SkL 75, 76, 78, 80, 101 and 125.

into both ecclesiastical and secular administration of justice that the Danish kingdom had to find a way of replacing the carrying of hot iron, which had previously been a crucial means of proof. In addition, Danish administration of justice had relied on negative proof in less serious cases, but this had now received strong papal disapproval. Negative proof was where the defendant could walk free if he could produce a specific number of oath-helpers who would vouchsafe for his good character rather than produce evidence pertinent to the accusation. This meant that a new discussion arose that covered more areas of the law than just procedure and evidence. Both the king and his advisors and those magnates learned in the law of Skåne knew that it was an entirely different situation to have a law fixed on parchment rather than an unwritten law based on custom. Therefore, the Law of Skåne reflects compromise, and in some cases there is a continued uncertainty about what is to be law in the future. However, the law of evidence played a substantial role for the writing down of the Law of Skåne, as can be seen from the fact that the most important recorded differences of opinion were concerned with the problem of who had the right to proof.

The compromise, which now covered many other areas of law than just inheritance and criminal law, was reached in the years immediately following 1215 and it is indeed a possibility that the Latin translation known as Archbishop Anders Sunesen's Paraphrase of the Law of Skåne was presented to the papal legate who visited Denmark in 1222 and possibly needed to discuss and have explained parts of the legal order in Denmark.¹¹

The period between the Danish version of the Law of Skåne and Anders Sunesen's Latin Paraphrase saw an attempt by the Danes to compile the so-called *Ættebodsforordning*—an ordinance of the kin's collective payment of *wergild*—which was a further attempt to make contemporary law conform to the new currents from the Church. This new legislation introduced the concept of personal guilt by forcing a murderer to pay a fine to the kin of the victim and the killer's kinsmen

¹¹ Gelting, "Skånske Lov og Jyske Lov", pp. 72–75. Archbishop Anders Sunesen's Latin Paraphrase of the Law of Skåne can be found in vol. I.2 of *Danmarks gamle Landskabslove med Kirkelovene* (Copenhagen, 1933), pp. 467–667 [hereafter ASun]. For the same remarks as mentioned above, see ASun 50 and 88. Andersen, *Lærd ret og verdslig lovgivning*, pp. 93–115, provides a detailed analysis of both SkL and ASun.

were to be liable for a fine if the killer escaped.¹² At one and the same time the rules introduced the canonical principle that only the sinner was liable for the sin whilst also increasing the responsibility of his kin for the criminal.¹³ The Ordinance of the Kin's Collective Payment of *Wergild* was attached to the law of Skåne and incorporated into Anders Sunesen's Paraphrase and its rules for kin's involvement in the payment of fines came to be the foundations of such rules for the entire kingdom in the later part of the thirteenth century.¹⁴

The de facto prohibition of carrying of hot iron and other Divine Judgements in 1215 left a gap in legal procedure, which was filled in Denmark by the introduction of juries that were charged with evaluating the evidence and sentencing. Probably in the latter part of 1222 or the beginning of 1223 the Danish king substituted the carrying of hot iron with 'proof by jury' in a decree valid for the jurisdiction of Skåne known as Valdemar II's *Jernbyrdsforordning* (Valdemar II's Ordinance of Ordeal by Hot Iron).¹⁵ The explanation of why this decree is only known for Skåne even though the prohibition must have been valid for the entire kingdom can be explained by the fact that the Law of Skåne was never systematically edited and that it was at this time that the province of Skåne had its law updated in accordance with The Book on Inheritance and Heinous Crimes and later decrees, while the two other provinces were probably also due to have updated their administration of justice at this time. In the other provinces, it was thus possible to simply introduce the new means of evidence embodied in the juries when the law was updated, i.e. written down. The manuscripts of the Law of Skåne that survive show that the older version of the law containing the ordeal of hot iron as a proof was replaced by a version that substituted other means of proof, which was to be

¹² See Tillæg II in DGL I.2, pp. 732–735. Poul Johs. Jørgensen, *Manddrabsforbrydelsen i den skaanske Ret fra Valdemarstiden* (Copenhagen, 1922), provides the classic summary of scholarship concerning these texts. A more recent treatment is Andersen, *Lærd ret og verdslig lovgivning*, pp. 97–101.

¹³ Fenger, *Fejde og mandebod*, pp. 370–374. This point is also made by Vogt, *The Function of Kinship in Medieval Nordic Legislation*, pp. 133–138.

¹⁴ See *Den danske rigsløvgivning indtil 1400*, ed. Erik Kroman (Copenhagen, 1971) [hereafter DRL 1], 14, § 4, p. 106. See Vogt, *The Function of Kinship in Medieval Nordic Legislation*, p. 137. For other additions to SkL, see Andersen, *Lærd ret og verdslig lovgivning*, pp. 97–101.

¹⁵ DD 1:596. For the dating, see previous references to Gelting, "Skånske Lov og Jyske Lov", and Andersen, *Lærd ret og verdslig lovgivning*.

presented before a specified number of jurors according to the kind of case being heard.¹⁶

The same legal procedure was implemented in the update of the law of Sjælland, which was written down at around the same time. Where the Ordinance on Manslaughter of 1200 meant that the Skåne criminal law changed decisively from its origins in The Book on Heinous Crimes, the equivalent law of Sjælland appears to have taken its starting-point directly in The Book on Inheritance and Heinous Crimes. Thus, various aspects of the naming of officials, the legal status of thralls/serfs and the inclusion of rules known from the Law of Skåne suggest that Valdemar's Law for Sjælland was composed shortly after 1222.¹⁷ The composition was probably a royal initiative since some rules from the Law of Skåne were used to fill gaps in existing law. Even though King Valdemar II had a more closely knit and stronger personal network of power on Sjælland than in the other parts of the kingdom, this does not mean that he could personally institute new law or change the already extant law without consulting the magnates of the province, as had been the case in Skåne. The version of Valdemar's Law for Sjælland probably issued shortly after 1222 is usually known as the 'older redaction', since we also have a linguistic 'younger redaction' from some time shortly after 1241.¹⁸

At some time in the years following 1222, Valdemar's Law for Sjælland was supplemented by a chapter on thieves and thralls/serfs. Later on more decisions supplemented the law and these were given a new name—Eriks Sjællandske Lov (Eric's Law for Sjælland). Eric's Law for Sjælland is divided into three books, but because of the inner logic and the decisions about the same subjects in the first and second book are contrary to some of those in the third book, it looks as if the

¹⁶ See Andersen, *Lærd ret og verdslig lovgivning*, pp. 94–96, 111–112.

¹⁷ Text 1 of Valdemars Sjællandske Lov can be found in vol. VIII of *Danmarks gamle Landskabslove med Kirkelovene* (Copenhagen, 1941) [hereafter VSL]. VSL and its previous scholarly literature is treated more extensively in Andersen, *Lærd ret og verdslig lovgivning*, pp. 129–135 and 143–147.

¹⁸ The 'older redaction' can be found as text 1 of Valdemar's Law for Sjælland in vol. VIII of *Danmarks gamle Landskabslove med Kirkelovene* (Copenhagen, 1941), pp. 1–104 [hereafter ÆR], see the previous note, and the 'younger redaction' can be found as text 1 in the same volume, pp. 245–362 [hereafter YR]. Substantially there is not much of a difference and I will thus refer to both redactions, although I refer to the older redaction when mentioning Valdemar's Law for Sjælland in general. The dates of the two redactions and the previous scholarly literature is treated more extensively in Andersen, *Lærd ret og verdslig lovgivning*, pp. 129–135 and 143–147.

first-edition supplement to the Valdemar's Law for Sjælland only consisted of two books that were later supplemented with the decisions contained in book three. The regulation of the power of the local royal official, the *ombudsman*, contained in the later parts of book three also indicate a significantly more centralised royal administration of justice than that found in the first books of Eric's Law for Sjælland.¹⁹

The two first books of Eric's Law for Sjælland thus date from before 1248 since legal documents from this year reveal that the rules about transfer of property were now beginning to be used in practice.²⁰ An argument against this date, however, is the fact that the carrying of hot iron appears in two chapters, but this can be explained on the basis of mere practicality, namely that it seems to have been difficult to define how else one could allow the defendant to disobey a summons or to postpone a procedure that had been initiated unless he had the possibility of presenting the evidence of hot iron. Thus in these chapters we probably see a deliberately old-fashioned formula with which the defendant could invoke—or rather be threatened with—the ultimate proof.²¹

In contrast to the first two books of Eric's Law for Sjælland, book three contains circumstantial evidence that is initially dated from the end of the thirteenth century. These indicators are to be found in references contained in other sources that King Eric VI Menved

¹⁹ Text 1 of Eric's Law for Sjælland can be found in vol. V of *Danmarks gamle Landskabslove med Kirkelovene* (Copenhagen, 1936) [hereafter ESL]. See Andersen, *Lærd ret og verdslig lovgivning*, pp. 149–182, for an analysis of the circumstances of its composition and of previous literature on the subject.

²⁰ See Vogt, *The Function of Kinship in Medieval Nordic Legislation*, pp. 68–71.

²¹ See Andersen, *Lærd ret og verdslig lovgivning*, pp. 161–163. The problem will be treated in detail below. The inclusion of trial by hot iron is not in itself evidence that such rules originate in an older layer of law. Some manuscripts of SkL from around the middle of the thirteenth century include the carrying of hot iron as the main source of evidence in cases of serious crimes. In real terms, this does not mean that the carrying of hot iron was re-introduced in mid-thirteenth-century Skåne: it is more likely that the change was an expression of the political contest between the king, the Church and the magnates which was such an important feature of the political landscape in Skåne in the 1250s. This tendency to claim ancient origins for new laws can also be seen in the Church Law for Skåne which claimed to be more than a century older than they actually were, see Thorkil Damsgaard Olsen, "Omkring kirkelovenes tilblivelse", eds. Poul Andersen, Christian Lisse, Karl Martin Nielsen, Hanne Ruus and John Kousgård Sørensen, *Festskrift til Kristian Hald. Navneforskning, Dialektologi, Sproghistorie* (Copenhagen, 1974), pp. 515–523, and Skyum-Nielsen, *Kirkekampen i Danmark*, pp. 67–88.

Text 1 of the Church Law for Skåne can be found in vol. I.2 of *Danmarks gamle Landskabslove med Kirkelovene* (Copenhagen, 1933) [hereafter SkKl], pp. 821–867.

(r. 1286–1319) published “the Sjælland law” and in the agreement between the third book of Eric’s Law for Sjælland and the so-called Thords Artikler (Thord’s Articles), which were elaborated at the beginning of the fourteenth century to update and supplement the rules contained in the Law of Jylland.²² Finally circumstantial evidence can be found internally in book three in connection with one of the royal prerogatives that we must assume to be from a late date. For these reasons, and because Eric’s Law for Sjælland is almost invariably included in manuscripts containing a younger redaction of Valdemar’s Law for Sjælland and Sjællandske Kirkelov (the Church Law for Sjælland, the earliest possible date for which is 1241), we must assume that book three of Eric’s Law for Sjælland was composed at a time when a linguistic updating and slight readjustment of valid law on Sjælland was taking place.²³

This updating most likely took place around 1282 when King Eric V Klipping (r. 1259–1286) had to abandon all attempts to harmonise the law of the kingdom when magnates and prelates forced him to publicly recognise the pluralist state in which each province applied its own law in a *håndfæstning*.²⁴ That the collection and modernisation of the Sjælland collections of laws originates in this period and was occasioned by an increased focus on confirming contemporary law gains support from the fact that the islands of Lolland, Falster and Møn, according to Eric V Klipping’s decree for Sjælland of 1284, adopted the Sjælland law known as ‘Sjællandsfar Lov’, probably meaning both Valdemar’s Law for Sjælland and Eric’s Law for Sjælland.²⁵

Thus the situation at the beginning of the 1230s seems to have been that there were written collections of law for Skåne and Sjælland but not for the third large province, Jylland—that is, unless the The Book on Inheritance and Heinous Crimes was valid for that province. It is therefore very likely that there was a royal wish to fix the legal situation in the province of Jylland and we must imagine that this work had been started a relatively brief time after the work with Valdemar’s Law

²² Text 1 of Thords Artikler can be found in vol. I.2 of *Danmarks gamle Landskabslove med Kirkelovene* (Copenhagen, 1933) [hereafter Thords Art.], pp. 821–867.

²³ Treated in more detail in Andersen, *Lærd ret og verdslig lovgivning*, pp. 164–169. Text 1 of the Church Law for Sjælland, which is almost identical to the Church Law for Skåne, can be found in vol. VIII of *Danmarks gamle Landskabslove med Kirkelovene* (Copenhagen, 1941) [hereafter SJKl], pp. 445–457.

²⁴ See DRL 1:13. See ch. 1, n. 10, above for an explanation of ‘håndfæstning’.

²⁵ DRL 1:16, § 16. See Andersen, *Lærd ret og verdslig lovgivning*, pp. 168–169.

for Sjælland. At this time, the king and his legal advisers had gained experience in compiling law and in negotiating with local magnates and peasantry in individual legal provinces and districts, the so-called *herreder*. Indeed, they had two models: namely the collections of law for Skåne and Sjælland, which meant that once again it was possible to ‘transplant’ decisions known from the two east Danish collections of law to the legal province of Jylland in those areas of law that had not yet been regulated in that province. Their experience must have also given them a greater knowledge of how to act. This insight was probably also underpinned by a more intimate knowledge of the law and the administration of justice contributed by the learned law, which must have been the result of an increased number of university trained Danes active in the royal administration, which seems to take more tangible shape in these years.²⁶

The Law of Jylland bears witness to a significantly more intimate knowledge of—and a significantly better adaptation of—the learned law’s principles of legal procedure than is evident in earlier Danish law collections. These principles were sometimes adapted into some West-Danish institutions that were already in existence and in some cases they no doubt needed new institutions in order to be implemented in the legal system, by the king, the Church or the regional magnates. In recognition of the fact that local rivalries could result in unjust decisions, the possibility of recourse was introduced meaning that the prelates and secular ‘heavies’ could put their power and influence behind the rejection of a local decision. At the same time the bishop and the ‘best men of the *bygd*’ (i.e. the *syssel*) were probably less locally affiliated and therefore probably also less biased than so many others.²⁷

However, there are also some indications that the king and his circle were not always able to force through all of the new institutions that

²⁶ See Niels Skyum-Nielsen, “Den danske konges kancelli i 1250’erne”, eds. Svend Ellehøj, Svend Gissel and Knud Vohn, *Festskrift til Astrid Friis på halvfjerdsårsdagen* (Copenhagen, 1963), pp. 225–245, and “Kanslere og skrivere i Danmark 1250–1282”, eds. Tage E. Christiansen, Svend Ellehøj and E. Ladewig Petersen, *Middelalderstudier. Tilegnede Aksel E. Christensen på tresårsdagen* (Copenhagen, 1966), pp. 141–184; Jens E. Olesen, “Middelalderen til 1536”. In addition see Bagge, “Nordic Students”, and Ole Fenger, *Notarius Publicus. Le Notaire au Moyen Âge latin* (Aarhus, 2001).

²⁷ Text 1 of Jyske Lov can be found in vol. II of *Danmarks gamle Landskabslove med Kirkelovene* (Copenhagen, 1933) [hereafter JL]. JL and its previous scholarly literature is treated more extensively in Andersen, *Lærd ret og verdslig lovgivning*, pp. 3–6, 191–298. See also Per Andersen. “The Power of the Law” ed. Lena Rohrbach, *The Power of the Book* (Berlin, 2011) (to be published).

they wanted to introduce. For example, in the last half of the thirteenth century it was necessary to grant the power to revert the decision of juries to the local community if the decision was not in agreement with the interpretation of law in the local area, which additionally indicates that the central power did not have the necessary clout to always do as it pleased. These facts must not be taken as proof of a definite distinction between a centralising and increasingly institutionalised royal power on one hand and on the other hand the local community as an equally institutionalised opponent. Whilst jurors swore fealty to the king, they had been chosen from amongst the inhabitants of the local community and also needed to maintain a social relationship with the local community, thus making it impossible to make a clear distinction between 'us and them'.

This demonstrates that, even though the prologue of the Law of Jylland informs us that the king 'gives' the law, in reality the law was the product of a process of negotiation. A process in which the price that the king and the Church had to pay for the administration of law that they wished for—and which in many cases gave the king the right to receive fines—was the local communities' right to reject individual decisions and thus secure a local consensus about what was valid law.

The Law of Jylland is divided into three books, but judging by the inner logic of the books and contradictions in rules between the first and third book it seems as if the law, like Eric's Law for Sjælland, has had new rules added to it at a later date after the publication of the first two books and the first part of book three in 1241. This seems to have happened before 1276, which is the date of the oldest surviving manuscript of the Law of Jylland, and which includes these later added chapters.²⁸ The law was not something given on one occasion: it was possible to add to it and probably to subtract things, or in any case to change the law when that was desirable. It is possible to trace a development towards less stringent demands of proof and a tendency to less severe sentencing from older to more recent manuscripts.²⁹ This bears witness to the fact that the thirteenth century increasingly considered some rules in the older form of the law to be too harsh.

²⁸ See Gelting, "Skånske Lov og Jyske Lov", pp. 58–60.

²⁹ Riis, "Det ældste håndskrift af Jyske Lov"; Andersen, *Lærd ret og verdslig lovgivning*, pp. 253–270.

The Law of Jylland also differs from the other Danish laws in other Danish geographical jurisdictions. First of all it is organised according to the institutions of legal administration, which are analysed in detail (other Danish law collections organise their discussions by topic). Secondly, superficially the institutions found in the Law of Jylland may appear unique compared to those found in other parts of contemporary Europe, but functionally they are part of an administration of justice that combines the form known from previous collections of law and contemporary Roman-canonical administration of justice to such an extent that these similarities cannot be coincidental. Thirdly, as already mentioned and just like *The Book on Inheritance and Heinous Crimes*, there is circumstantial evidence indicating that in 1241 the Law of Jylland was intended as a law covering the entire kingdom. This is clear from 1) the circumstances of its publication in Vordingborg on Sjælland where the kingdom's bishops and an unnamed group of magnates witnessed its publication; 2) the fact that it is only in later manuscripts that the law is referred to as the Law of Jylland while it has no geographical association in the oldest manuscripts; and 3) that other contemporary sources give the impression that there was one law book that had greater authority than others. However, regardless of what the intention of the law may have been, we must conclude that all surviving evidence indicates that it was only accepted and implemented in the province of Jylland.³⁰

This brief summary of the origins of the provincial laws shows clearly that contemporary society was willing to change law to reflect changing power politics and the development of the learned law, even though the latter did not have the same obvious influence on the development of previous laws as it had in the development of the Law of Jylland. What has been stated here is in stark contrast to previous scholarship, which postulates that there was inertia in the development of law and that contemporaries slavishly copied one collection of law after another. From the example of the Danish provincial laws we must therefore conclude that medieval man's idea of law was far from being as static as traditional interpretations have maintained. I argue that Danish collections of law from the High Middle Ages reflect a conscious and intentional change in the administration of law. Danish

³⁰ See Gelting, "Skånske Lov og Jyske Lov"; Andersen, *Lærd ret og verdslig lovgivning*, pp. 279–298.

legislation of the High Middle Ages was thus an extremely dynamic process in which the law-giver—conforming to contemporary European trends—did not hold back from adding to existing collections of law in response to new problems and legal disputes in society as they occurred.

The additions to the law books came about in one of two ways: either through decisions creating precedents or through royal decrees or decisions.³¹ In addition, laws were adapted in reaction to changing circumstance or as a consequence of complaints, which probably occurred. We may take the fact that many of the collections of law were edited in terms of linguistics and clarity and coherence of argument to bear testimony to the fact that there was not (always) an unquestioning reproduction and thus a repetition of contemporary law as it was formulated in written collections. The collections of law of the High Middle Ages thus seem to have followed the same development as society, language and legal learning underwent at the same time as the king and the Church obviously attempted to use the same collections of law as instruments to guide developments in their desired direction.

This dynamic will be explored further with regard to the institutions of legal administration and the procedural law that is mentioned in individual collections of law in the next two chapters.

³¹ Gelting, "Skånske Lov og Jyske Lov", pp. 60–70.

CHAPTER FIVE

THE INSTITUTIONS OF LEGAL ADMINISTRATION

Our first insight into Danish procedural law and the administration of law comes with the initials writing down of the provincial laws. Until then, surviving sources do not contain one word about procedure in cases of transgression against secular law. This changes with the writing down of the provincial laws, and an analysis of the administration of justice as contained in the possibly national *The Book on Inheritance and Heinous Crimes* and the provincial *Law of Skåne*, *Valdemar's Law for Sjælland*, *Eric's Law for Sjælland* and the *Law of Jylland* shows that procedural law and the institutions for administering justice developed in tandem with the writing down, additions to and editing of the collections of law.

Legal institutions in particular are increasingly mentioned. Both this and the increasingly detailed regulation of them seem to indicate a development towards increased royal influence over both the sentencing and the executive functions. According to legislation, the king was given concrete authority to, and the ideological possibility of, confirming and maybe even appointing the men who were to pass sentence or were responsible for the execution of a sentence passed at the *ting*. According to the provincial laws, the king placed himself more centrally in relation to important institutions of legal administration in the thirteenth and later centuries.

It is this development of the institutions of legal administration that is the focus of this chapter and, for the sake of clarity, this development will be treated in relation to the office-holder's function—asking whether his was primarily a sentencing function or if it was executive, i.e. was his evaluation of the situation the one that determined the outcome of a case, or was he the person who carried through a decision or assisted in its execution? In the first case, he would be a member of the group of officials, in so far as we can use the term 'official' at this time, who had sentencing functions, while in the latter, he would belong to the group who had executive functions.

The Sentencing Functions

According to the provincial laws the sentencing functions were taken care of at two legal levels: the *herredsting* (district court) and the *landsting* (provincial court). Both levels are present in The Book on Inheritance and Heinous Crimes, but since it covers little apart from a small amount of violent breaches of the peace and matters of inheritance, it is only in the later provincial laws that the two *ting* and their competence are differentiated and outlined. In fact, this is the case for a large number of the legal phenomena and institutions of law that are covered by the provincial laws.

Three general explanations can be given to explain why many of the legal phenomena and legal institutions are only explained and outlined in detail in the later law codes—and here I am thinking mainly of Eric's Law for Sjøælland and the Law of Jylland—even though they may have been mentioned in older law codes. The first explanation is linked to the previously mentioned traditional paradigm that saw the provincial laws as the expression of a writing down of already existing legal norms, while two other explanations spring from what is described previously as the new paradigm that takes the point of view that the writing down of the provincial laws and their rules played a role in and reflected contemporary political struggles and ideological currents.

The first explanation for why some legal phenomena and legal institutions—such as the timing of meetings and the division of jurisdictions between district courts and provincial courts—are elaborated or confirmed in the later provincial laws is that it was not necessary to write this information down in the first compilations of law because they were known by everyone through custom. The traditional assumption has been that the formation of law from the oldest times through to the High Middle Ages took place in the consciousness of the people and was given its exterior form through popular decisions at the *ting*. Thus, law and decisions about, for example, timings of meetings were local and therefore known by everyone (but apparently forgotten later on).

The second explanation is that it was only when law was written down that phenomena or institutions were introduced into the legal system, for which reason it was necessary to explain them. This explanation is based on the assumption that law is developed by external inspiration, locally for example by central, i.e. royal, inspiration and nationally from the universities further south in Europe where

Danish students were trained in Roman and canon law. This kind of transfer or adoption of legal rules and norms has been characterised by Allan Watson as 'legal transplants'.¹ In the case of the *ting* as an institution such an explanation must be considered so unlikely that we must disregard it, but it may have been a factor for individual rules or principles of law.

The third explanation of the accelerating elaboration and confirmation might be that society had arrived at a point where it was no longer possible to live with—and the legal system could no longer function with—its internal contradictions or uncertainties about the law itself or its institutions, and therefore it became necessary once and for all to establish what was law, what the exact contents of a legal phenomenon were and which competences a legal institution had and which rules governed it. This mode of explanation operates under the assumption that legal phenomena found in the provincial laws may be older and that the increasing discussion or elaboration of them is caused by the fact that the phenomenon or legal institution, at the time of writing down, were under pressure to be abolished or maybe transformed or watered down locally in a direction that was unacceptable for all legal actors or interested parties. For this reason it was necessary to root out all forms of disagreement or doubt about the exact content of a phenomenon or legal institution and therefore law was fixed by being written down (possibly after negotiation between interested parties).

The latter explanation is close to the historians' traditional conception of differing strata in the law, but there is a clear difference in the fact that the historians did not pay much attention to why some legal phenomena and institutions were regulated to an increasing degree. The historians and the practitioners who subscribe to this traditional paradigm seem to assume that the increased number of mentions of such phenomena and legal institutions, as mentioned in the first explanation, was just a consequence of the fact that old, good law was finally written down while newer and to my mind more convincing studies argue that the increased regulation or mention can be ascribed to contemporary circumstances and a conscious wish to direct law along

¹ See Allan Watson, *Legal Transplants. An Approach to Comparative Law* (Charlottesville, 1974), and *The Evolution of Western Private Law* (exp. vers., Baltimore & London, 2001).

a particular path.² In the latter case, the content of the laws therefore reflects ideologies concerning how society *ought to be* constructed rather than contain information about how society *was* constructed.

One explanation, of course, does not exclude the other—it was not necessarily an either-or situation. In some cases it may have been the old but still valid law that was written down since no objections based on power-politics could be raised against confirming those particular rules. In other cases, we undoubtedly see the creation or introduction of new legal phenomena and institutions as a consequence of a constantly developing society. Inspiration for this could have come from a study of how other countries constructed law and legal systems to meet new challenges, and in some cases, as far as I can see, the laws described a legal institution or some such thing about which there was disagreement but which was either being introduced or discarded.

It is clear from the increased concern with fixing times for the meetings of the *herreds-* and *landsting* found in The Book on Inheritance and Heinous Crimes that these institutions must predate The Book on Inheritance and Heinous Crimes. Both institutions seem to date to around 1100 or earlier and The Book on Inheritance and Heinous Crimes simply contains too few descriptions of these institutions to reflect a situation in which these were just being introduced.³ Therefore, the increased mention of these institutions in The Book on Inheritance and Heinous Crimes and later collections must be seen as an expression of the fact that, as these institutions matured, an increased need was felt to clarify how the *ting* was to be conducted and about the two legal institutions' competences and mutual relations. It is a natural assumption that this development was a consequence of royal attempts to play a larger role in the exercise of justice and in particular in the practice of the courts, particularly in connection with judicial procedure. Such a development was possibly occasioned by the local communities' or local and regional magnates' resistance to an increase in royal power.

² See Vogt, *The Function of Kinship in Medieval Nordic Legislation*, and Gelting, "Odelsrett".

³ See Jens Ulf Jørgensen, "Herred", *Den store danske encyclopædi* 8, pp. 411–412. This should be contrasted to the earlier interpretation found in Poul Rasmussen, "Herred", *KLNM* VI, col. 488–491, and Herluf Nielsen, "Landskap, Danmark", *KLNM* X, col. 235–236.

In the Law of Skåne, there is a reference to the opinion of some people that it must be the king's ombudsman who determines cases of theft, but this is rejected in no uncertain terms by Anders Sunesen's Paraphrase of the Law of Skåne, which states that it is the jury men who have the power to do to the thief whatever they wish.⁴ Although the same collection (and a little later the first version of Valdemar's Law for Sjælland) mentions that all cases can be initiated either before the *ting*, the king or the archbishop, it immediately limits free choice by adding that recourse to the king or the archbishop is only possible if the legal dispute concerns lack of access to an otherwise public by-way or the redistribution of common areas in a town.⁵ The natural explanation for these exceptions is that in these particular cases an appeal to and a legal procedure in front of the local *herredsting* would not meet the demands of the ecclesiastical learned law that cases should be conducted in front of disinterested courts—apparently it was a major concern to ensure that the case was heard by a disinterested court.⁶

As a starting-point it is doubtful whether the king had particular influence on the administration of justice of the *ting*. The monk Ælnoth, who penned a *vita* of King Canute IV in which the king was presented as a just and competent prince, tells (as already mentioned) the story about the *landsting* in Viborg that often a large crowd of men gathered from all over Jylland to negotiate and decide on common concerns and to debate the justice of the laws, their continued validity and to firm them up.⁷ At this time, the king clearly did not play a prominent role and this is undoubtedly the reason why various kings worked towards establishing an institution for the administration of justice similar to the already existing *herreds-* and *landsting* where he, as the prince of the realm, could act as an enforcer of the law. An indication of such an expanding role for the royal court, which was established in open competition with the *herreds-* and *landsting*, can be found in the institution of 'tinglysning'.

⁴ SkL 151 and 153; ASun 95.

⁵ SkL 67 and 69; ÆR 191, 212 and 200.

⁶ James A. Brundage, *Medieval Canon Law* (London & New York, 1995), pp. 145–147, argues that an ecclesiastical judge must pass an *objective* sentence in cases of notorious crimes, i.e. where the culprit became liable to a sentence (e.g. excommunication) as a consequence of committing a particular crime rather than after the crime was examined by the court.

⁷ See Ch. One, n. 2, above.

To *tinglyse*, to register, a transfer of property, and other such legal transactions, gained increased significance as evidence throughout the Middle Ages because it publicised a legal transaction. The Law of Skåne and the oldest version of Valdemar's Law for Sjælland allowed someone to publicise the raising of a surety, the giving of an inheritance, or the adoption of illegitimate children at a *herreds-* or *landsting* of his own choosing.⁸ However, in the younger redaction of Valdemar's Law for Sjælland, which is presumed to originate in the second half of the thirteenth century, such a *tinglysning* could also take place before the king.⁹ However, it was only towards the end of the thirteenth century that a royal court of law had developed into a settled institution,¹⁰ so until then the political power struggle concerning law had taken place primarily in the local *herredsting* and probably also in the regional *landsting*.

There does not seem to have been a settled sequence of appeal, but from the earliest written provincial laws we sense a certain distribution of cases according to subject. In The Book on Inheritance and Heinous Crimes and several later collections of law we learn that while less serious transgressions against the law such as illegal fences or arbitration in cases of wounding could be decided by or take place at the *herredsting*,¹¹ all cases concerning serious transgressions such as manslaughter, malicious damage and refusal to pay fines—which could result in outlawry—had to be heard before the *landsting*.¹² Outlawry simply was not a deterrent if it only covered the *herred*. If it was to have any deterrent effect it had to include the entire province, and in that case a decision had to be pronounced by the (provincial) *landsting*. A similar distinction between less serious and serious transgressions

⁸ ÆR 83, 85, 181, 184, 187, 188 and 214; SkL 17, 19, 71 and 73. In addition, see SkL 17, 41, 42, 52, 60, 61, 62, 63, 126, 148 and 231. The rules that govern a father's public declaration of his intention to let his *slegfredsbørn* (illegitimate children by a concubine) inherit on equal terms with other family members are contained in chapter 59; in such cases references to the *herredsting* have been removed in later editions of the laws, see the textual apparatus to DGL I.1 (p. 36).

⁹ YR 68–69 compared to ÆR 181 and 188.

¹⁰ Lerdam, *Kongen og tinget*, pp. 12 and 21.

¹¹ A & O III 9, IV 10; ÆR 159; YR 58; ÆR 100–01; YR 31–32. See SkL 188 and 214.

¹² A & O II 1 and III 1, ÆR 140 and YR 51; ÆR 144–149 and YR 53–54; ESL II 37, II 50 and 51. Some chapters refer only to the *ting*, but since these chapters deal with serious breaches of the law which might subject the culprit to a sentence of outlawry the word *ting* must refer to the *landsting*, see A & O III 10, III 13 and III 21; ÆR 160, YR 59; ÆR 163, YR 60; ÆR 175, YR 65. This is pointed out in the Ordinance on Manslaughter of 1200, see DD 1:4:24 (in particular § 3 concerning killing).

against the law is also found in cases where a peasant had made an illegal construction, because if that construction was a fence or a hedge the men of the *herred* (in the *herredsting*) could sentence him to chop it down, but if the illegal construction was a house such a decision had to be made by the *landsting*.¹³

Thus it was not a prerequisite that there was a *herredsting* sentence before the case could be heard by the *landsting*—on the contrary. The most serious transgressions against the law could, or may even have had to, be published at the *landsting*, which also took care of less serious transgressions such as theft or wounds. If the parties could not agree to the extent of the wound, and therefore about the size of compensation owed—firstly with the help of friends and kin and secondly through the intercession of the *herredsting*—the case could be heard by the *landsting*, which was also competent to pass sentence.¹⁴ However, all other possibilities for a legal settlement had to be exhausted—as is most emphatically stated in the Ordinance on Manslaughter of 28 December 1200¹⁵—before such an approach was acceptable. It was thus the fact that the parties had exhausted all possibilities for settlement that occasioned the possibility to transfer the case to the *landsting* and not an appeal against the sentences.

Despite the fact that it was thus possible for local and regional *ting* to determine cases, we cannot see the early Danish legal system as a hierarchical system allowing for a clear succession of appeals. It was a horizontal system that imposed a certain division according to subject matter—or a system that granted the plaintiff the possibility of raising his complaint where he had the greatest chance of success so that the individual *ting*, on the one hand, did not suffer an unsustainable caseload and, on the other, had the possibility of putting its authority and power behind its decisions in specific cases. Thus the *landsting*, with regard to both the geographical extent of its decisions and in its composition, wielded a different kind of authority than that of the local *herredsting*.

Hence most cases seem to have taken place or at least have started in the *herred* (*provincia* in Latin)¹⁶ at the local *ting* while the *landsting*

¹³ A & O III 9, ÆR 159 and YR 58.

¹⁴ A & O IV 10, ÆR 100–101 and YR 31–32. See also YR 87.

¹⁵ DD 1:4:24, §§ 1–2, concerning cases of theft and wounding.

¹⁶ ASun 17, 29 and 33.

(*ius generale* in Latin) in relation to the land (*terra* in Latin)¹⁷ was a kind of last resort for justice without functioning as a court of appeal. In the Law of Skåne the *landsting* was referred to as the place where one could initiate a case if the defendant had not appeared at the *herredsting* or had not respected a sentence that had been passed, but if this was the case the suit had to be initiated and decided afresh¹⁸—the purpose of this system was to secure the passing of a sentence no matter what. Regardless of which of the *ting* that were mentioned, the laws stipulated that the *tingmen*, i.e. the men attending the *ting*, could pass sentence or that the *land*, that is the province as a social unit, was the sentencing party.¹⁹

As we will see, in the earliest collections of law the outcome and sentence were determined by whether the defendant could produce the required counter-proof against the plaintiff's allegations. The statement that the *ting* 'sentenced' or passed does not necessarily mean that the *ting* was given the opportunity to investigate or weigh the allegations of the plaintiff or the evidence produced before the *ting* and thus to produce a judgement based on such evidence. To 'pass sentence' was to state publicly which sanction was appropriate in a case where the defendant had not been able to disprove the allegations of the plaintiff—because if he could not do so he was obviously guilty: indeed, the defendant was guilty until proven innocent.

The question of who were the members of the *ting* was not a concern of the provincial laws, but they were probably knowledgeable men learned in law (*prudentibus et iuris periti*) who are mentioned in the paraphrase of the Law of Skåne as those who had a knowledge of what was right²⁰ and amongst whom we would probably find regional magnates, local gentry and such like.

But this is enough about the relationships between *herreds-* and *landsting* in the oldest laws. In connection with this it is interesting that it is only in Eric's Law for Sjælland that we find rules concerning when and where a *ting* should take place and how many participants are needed to create a quorum. The rules that we do find are only concerned with the *herredsting*, and concerning this we learn that the

¹⁷ Asun 85 and 90. Andersen, *Lærd ret og verdslig lovgivning*, pp. 284–286, discusses these terms.

¹⁸ SkL 139 and 145.

¹⁹ See SkL 138, 139, 162, 163, 170, 184 and 226; Asun 184.

²⁰ ASun 35.

king, with the consent of the *herred*, determines the place and that if necessary the date of the *ting*—which apparently could take place on any day of the week.²¹ The *ting* could last from dawn till dusk on the customary *ting* day and there had to be at least twelve men present in order for the *ting* to be legal. Normally *ting* could not be held on certain holy days and the only exception from this rule was when a man prosecuted another man for theft, when he had been caught red-handed. In such cases 24 men were needed to create a quorum to guarantee that an innocent man would not risk being found guilty by an ad-hoc *ting* consisting of the plaintiff and his associates.²² These rules and the lack of rules for the conduct of the *landsting* could either mean that towards the middle of the thirteenth century the king started to interfere in and control local matters, but that he did not yet have the strength to demand specific procedures in the *landsting*, or that existing practice was not disputed, or that there was a tacit agreement that rules concerning *herredsting* were also valid for the *landsting*—the latter of which is probably the most likely.

New Directions—The Law of Jylland

The picture of the institutions for the administration of justice with sentencing functions that we find in *The Book on Inheritance and Heinous Crimes*, the *Law of Skåne* and *Valdemar's Law for Sjælland* is, as I have said before, a horizontal system consisting of local *herredsting* and regional *landsting*, where less serious legal problems were determined by the former while the more serious transgressions were determined by the latter. In both cases, those men who were present and appointed ad hoc were charged with supervising the defendant's production of particular counter-proofs against the accusations of the plaintiff.

This system presumably existed in Jylland even before the publication of the *Law of Jylland*, but we have no documentary evidence for this and the institutions for the administration of justice with sentencing functions that are mentioned in the *Law of Jylland* are of an

²¹ ESL II 51.

²² ESL II 48–49. See Poul Johs. Jørgensen, "Tyveri og Ran i de danske Landskabslove", ed. Erik Reitzel-Nielsen, *Festskrift til Professor, Dr. Juris Vinding Kruse paa Tresårsdagen* (Copenhagen, 1940), pp. 157–203.

entirely different type. I have previously proposed that the explanation for this may be that the king met less resistance to his project of centralisation in Jylland because there were fewer important magnates and thus it was possible to force through institutions of a different calibre than in other provinces.²³ However, when individual juries were appointed in Jylland and had produced their oaths before the royal ombudsman, the main concern must have been to ensure the disinterestedness of the juries. (Even though this does not exclude the possibility that the king was at the same time pursuing a political agenda to centralise the administration of justice.) The juries were chosen from among local men and therefore it was necessary to ensure that they had more authority while at the same time ensuring that they were personally liable to the king if they were not as disinterested as they swore themselves to be. The institutions for the administration of justice that are mentioned in the Law of Jylland gain their authority in the main from their appointment by the king and the fact that the members were appointed either for one year at a time or for their entire lifetime, an aspect of the appointments procedure that testifies to an attempt to professionalise those who held a knowledge of law and to secure disinterested decisions.

The fundamental structure of the *ting* was not changed. The institutions of legal administration in Jylland were also based on the *herreds-* and *landsting*, but the group of members who pronounced sentence had both an entirely different composition and base and, in practice, they were assigned an entirely different task than other participants in the *ting* of other provinces. Those members who, according to the Law of Jylland, had a say in a case were not just charged with the task of finding out whether the defendant could disprove the claims of the plaintiff: they were charged with discovering the truth. Whether this meant that they were to examine the case and the evidence produced and against this background pass a sentence or whether they should pass a sentence based on what the royally appointed members of the *ting* charged with sentencing had heard and seen is not clear from the wording of the Law of Jylland. However, a case dating to 1481 from Salling *herred* seems to indicate that the decision in the case was based

²³ Discussed in more detail in Andersen, *Rex imperator in regno suo*, pp. 78–94, and *Lærd ret og verdslig lovgivning*, pp. 279–298.

on a discussion of the accusations made and the evidence produced.²⁴ It is certain however that the men attending the *ting* who, according to the Law of Jylland, were to seek out the truth, had a sentencing function in contrast to the men who had been appointed ad hoc, as this is stipulated in the older provincial laws (and with reference to particular kinds of cases such as the treatment of boundaries in the first book of the Law of Jylland).

As mentioned above, those ‘judges’ or juries that were institutionalised by the second book of the Law of Jylland to secure their disinterestedness could be appointed for one year at a time or for the duration of their life. In contrast to this, the juries mentioned in book one were appointed ad hoc because of their knowledge of the individual case. According to book two, there were different types of juries that were responsible for differing types of cases depending on the gravity of the case and its subject. On the one hand, the introduction of royally appointed jurors meant that the local administration of justice underwent a politically motivated centralisation—even though the jurors were recruited from the local population—but this division into separate types of juries can also be seen as an attempt to secure groups of jurors who were expert in certain types of cases. A ‘professionalization’ of this kind could of course be secured by establishing a permanent full-time jury that could hear all kinds of cases. However, this would be both an economic burden for the king, since such juries had to function on all levels all the way down to the *herred* in order to meet the demand for immediate justice, and an extensive organisational challenge. Although the organisation of a professional and central royal administration is first seen in the middle of the thirteenth century, the bi-partite organisation of juries seems to have been the best alternative that satisfied both the local community and the Church’s demands for a more objective and therefore more just treatment of cases that did not depend on local political relations and the whim of individual magnates. In addition, the royal inclusion of local jurors contributed to the local acceptance of the setting-aside of the purely automatic law of evidence—that the defendant produced proof that by its production alone determined the question of guilt—

²⁴ Rep. 2:3:4895 (1481).

in return for the juries' sentencing determinations.²⁵ Thus the local community received a guarantee that the decision would be reached with their involvement.

All this and the arguments in favour of this will be analysed in more detail below where we will take a closer look at the sentencing functions as they appear in the Law of Jylland. In this connection I shall not devote separate sections to *herreds-* and *landsting* since the 1241 law does not add to the picture already provided by other Danish collections of law, i.e. that there was a certain degree of division by subject between the two institutions of justice and that the *landsting* could be brought in if litigation at the *herredsting* produced an unsatisfactory outcome.

Sandemænd

The most thoroughly investigated jury in the Law of Jylland is the *sandemænd*, who were to evaluate cases concerning the most serious transgressions against the law, i.e. killings or amputations, rape, malicious damage, imprisonment and wounds, and—less bloody—boundaries and church property valued at more than one mark silver.²⁶ Killings, malicious damage and imprisonment attracted a hefty fine of forty marks while rape resulted in outlawry.²⁷ Considering the fact that three marks was an economic-social boundary whereby a man could lose his status as a legal subject by not being able to pay a fine of this amount to regain his right to pursue litigation,²⁸ then forty marks bears witness to the fact that these were the most serious crimes, which only a small minority of the population could afford to pay a fine for or indeed commit.

The difference between serious cases and less serious cases was that the *sandemænd* had to publish their evaluation of cases concerning

²⁵ See Anders Bøgh, "Magten i middelalderen. En skitse af statsmagtens etablering og udvikling i Danmark belyst ved etableringen og udviklingen af dommerfunktioner", *Den Jyske Historiker* 2 (1987), pp. 85–106, esp. 95.

²⁶ JL II 2 and I 44, II 15, II 21 and III 37. If there is disagreement between a free landowner and the Church concerning land valued at less than one mark, different rules applied, see JL I 44.

²⁷ See Poul Johs. Jørgensen, "Hærværksforbrydelsen i Landskabslovene", ed. Poul Nørhund, *Festskrift til Kr. Erslev* (Copenhagen, 1927), pp. 31–60, esp. 50. Concerning rape as a serious crime, see Inger Dübeck, "Voldtægtsforbrydelsen i retshistorisk belysning", *HT* (2003), pp. 53–81, esp. 56–58.

²⁸ Fenger, "Tremarksmanden".

killings, amputations, malicious damage, imprisonment and rape in the *landsting* while cases concerning boundaries were to be determined on the land under dispute and cases concerning wounds and Church property and cases against a peasant were to be determined at the *herredsting*.²⁹ Regardless of where the case should be heard, it was the *sandemænd* who were local to where the transgression took place who evaluated a case and therefore there must have been royally appointed *sandemænd* in every *herred*.³⁰

The institution of the *sandemænd* is usually assumed to have been introduced by the Law of Jylland,³¹ at least so far as its sentencing powers are concerned, but this is not the case. As early as the arbitration by Valdemar II concerning cases of sacrilege from Fyn in 1228 the *sandemænd* are mentioned as part of the execution of punishment. We learn from this document that if the *sandemænd* swore a man to the royal fine for killing, which is known as *blodvide*, then the so-called 'bishop's jurymen' (to whom I shall return later) could be requested or ordered by the bishop's ombudsman (*official*) to decide whether the killing took place on a holy day or not.³² Thus the *sandemænd* were not a new institution when the Law of Jylland was passed, and the office of the *sandemænd* may even go further back than 1228 since their competence to decide cases concerning field boundaries and disputes about land between lay people and the Church falls far outside the competence for punishment that they are granted by the Law of Jylland. This indicates that we are seeing a far older institution. The mention of the *sandemænd* in connection with the sacrilege case from Fyn may also indicate that it was an institution that grew out of the ecclesiastical jurisdiction, but such an interpretation of the evidence is contradicted by the fact that the *sandemænd* are only mentioned in secular contexts and thus their role in the sacrilege case must be seen as an expression of the fact that they passed sentence on a killing that

²⁹ JL II 3.

³⁰ JL II 11 and JL II 1, II 3 and II 4.

³¹ For example Hoff, *Lov og landskab*, p. 344.

³² DD 1:679: "...ut cum *ueridici* adiurassent aliquem reatui qui *blodhæwitæ* dicitur..." (my italics). The same translation for *sandemænd* is found in the later Latin translation of JL, see DGL IV, text 5, JL II 1–38. The concept 'blodvide', which is often rendered as 'blood fine', is also known from JL II 13, which gives the *sandemænd* the same competency as is found in cases of sacrilege and also in ESL III 46, where the fine is 3 marks.

had the additional complication that the killing may have been committed on a holy day.

Since the *sandemænd* were already known in 1228 or before this date, it appears strange that the Law of Jylland provides such exact rules concerning their background, their appointment and their responsibilities.³³ Two explanations can be offered for this: either the institution itself was given a wider geographical coverage into areas that were not familiar with its function, or the Law of Jylland granted the *sandemænd* powers to evaluate and decide more cases than they previously enjoyed.

As an argument against the latter explanation we must consider the fact that the new kinds of cases were disputes about land between ecclesiastical and secular landowners—which as mentioned above may have come from an earlier period given the extent and seriousness of the cases involving *sandemænd*: Could one expect that they—after having decided cases on severe crimes for decades—were ordered to decide less severe cases on land as a new task? Hardly.

The detailed rules must therefore be seen as evidence that the *sandemænd* jury was either an unknown institution for some of those who were to understand and use the Law of Jylland or that there had been disagreement about how they were to be selected and what the extent of their powers should be. The former explanation—that the institution of the *sandemænd* was to be implemented over a larger area where there was less familiarity with their function in the administration of justice—may support the idea that the Law of Jylland was originally conceived as a statement of law for the entire kingdom:³⁴ although it is also a possibility that we are seeing a legal institution from the island of Fyn that was intended by the makers of the Law of Jylland to be extended into the administration of secular justice in the entire province of Jylland.³⁵ There is however also the possibility that the extensive rules of the Law of Jylland were intended to define an

³³ This is especially in JL II 1–7, which is the foundation of our analysis below. Where nothing else is mentioned information is gleaned from this source.

³⁴ See chapter 4 above.

³⁵ It is impossible to decide when the province of Fyn, whose provincial court convened in Odense, entered into the jurisdiction of Jylland and it is not possible from the mention in Thord's Articles from around 1304 to decide conclusively whether Fyn had a law that was different from the law of Jylland or whether it was the case that the provincial court in Jylland enjoyed jurisdiction both in Jylland and Fyn, see Thords Art. 71.

institution that may have gone far back in time but which was different in differing legal provinces in terms of competence and appointment. It is not possible to determine from the sources which of these interpretations is the correct one, but it is certain that the institution itself dates from the time before the Law of Jylland.

The Law of Jylland stipulates that there must be eight *sandemænd* in each *herred*, two from each *ferding* (quarter). The mention of quarters in the Law of Jylland makes it clear that a *herred* was sub-divided into four 'districts'³⁶ and it was a rule that the *sandemænd* must possess property in the quarter that they represented and that they could not come from the same *fællig* (that is that they could not hold shares in the same property). In addition, the Law of Jylland demanded that they were at least a *bryde*, i.e. a legally defined administrator who either rented, managed or leased farmland belonging to a landowner, and demanded that they could not be *sandemænd* if they were *landboer*, i.e. if they did not own land themselves but merely rented it and had no administrative function.³⁷ The Law of Jylland further required *sandemænd* not to have sub-tenants on their land in the *herred* that they represented, i.e. they were not allowed to have economic interests in the *herred* except for the land that they cultivated themselves.

The Law of Jylland stipulated that it was the king who provided letters publicly announcing the identity of the *sandemænd* and that the royal ombudsman supervised their swearing-in. In practical terms, it would have been impossible for the king personally to choose the many *sandemænd* of the kingdom and it must have been his local representative—the very same ombudsman who supervised their swearing-in—who suggested possible candidates who could both meet the formal demands of social status and economic solvency and who could also surmount the physical difficulties of participating in the *landsting* and could disregard the hostilities that their decisions could occasion.³⁸ At their swearing-in, the chosen *sandemænd* swore that they would not be influenced by wealth, affinity or party interests, but that they would only swear, i.e. evaluate, and pass the sentence they found to be correct and in accordance with the truth. Thus they had

³⁶ See the mention in JL II 1 and II 50 and III 64.

³⁷ For a closer analysis of these differences, see Ulsig, "Landboer og bryder, skat og landgilde", pp. 142–146.

³⁸ See Poul Johs. Jørgensen, "Biskop og bedste Bygdemænd", *Tidsskrift for Rettsvitenskap* [hereafter TfR] (1944), pp. 74–131, esp. 75–76.

also formally sworn using a formulaic oath that they would decide cases that might implicate members of their family or kin—which we know was also the case for those advocates who practised within the canon law.³⁹

The *sandemænd* were not only to evaluate the evidence produced before the court because in cases of homicide where the culprit was not immediately identified they had a duty to try to determine who performed the killing or what caused the death, in other words the *sandemænd* were supposed to gather knowledge about events and culpability or let their decision be determined by what they had learned themselves or had heard about events. If a *sandemand* did not know or had not heard about events, a decision in such cases could only be made by summoning witnesses for interrogation, which meant that the *sandemænd* (at least in these cases) clearly had inquisitorial—that is investigative—powers.⁴⁰ The aim, in other words, was to find the truth by the means at their disposal: terminologically, this duty appears in several places in contemporary Scandinavian laws,⁴¹ and this change in aim presumably happened under strong influence from the Church.

The procedure found in the oldest provincial laws is *accusatory*, in which a private party summons another private party and in which the role of the judge or the *ting* was solely to ensure that fixed proofs were produced so that an already defined sentence could be meted out. This

³⁹ See James A. Brundage, "The Calumny Oath and Ethical Ideals of Canonical Advocates", eds. Peter Landau and Joerg Müller, *Proceedings of the Ninth Congress of Medieval Canon Law* (Citta del Vaticano, 1997), pp. 793–805. In these cases advocates promised to work as preventers of crimes, see Richard M. Fraher, "Preventing Crime in the High Middle Ages: The Medieval Lawyer's Search for Deterrence", eds. James Ross Sweeney and Stanley Chodorow, *Popes, Teachers, and Canon Law in the Middle Ages* (Ithaca, 1989), pp. 213–233. Also Sjællandske Kirkelov, which dates from 1171, emphasises that jurors must be unbiased, see SJKL chap. 5; text 1 of Sjællandske Kirkelov can be found in vol. VIII of *Danmarks gamle Landskabslove med Kirkelovene* (Copenhagen, 1941), pp. 445–457 [hereafter SJKL]. Ruth Schmidt-Wiegand, "Eid und Gelöbniß, Formel und Formular im mittelalterlichen Recht", ed. Peter Classen, *Recht und Schrift im Mittelalter* (Vorträge und Forschungen 23) (Sigmaringen, 1977), pp. 55–90, discusses the possible implications of the later transition from oral to written oaths.

⁴⁰ Danish legal historians have generally rejected the proposition that inquisitorial procedure played any role in secular courts in Denmark, see Jørgensen, *Dansk Retshistorie*, p. 136. If one maintains that the deciding characteristic of the inquisitorial procedure is the right and duty of the 'public', i.e. the state in criminal cases, it is possible to uphold this position. However, if one thinks that the determining characteristic is the inquisition, i.e. the possibility of questioning and interrogation, it is different.

⁴¹ See See, *Altnordische Rechtswörter*, pp. 181–182, 225–228.

was clearly not enough for the Law of Jylland. Its aim was to establish the truth, and it is in this aspect that we find inspiration from the Church because, in comparison to the accusatory procedure found in secular law, the inquisitorial procedure introduced by Pope Innocent III took its starting-point in the Church's desire for the judge to find truth instead of just being convinced about guilt according to fixed forms of proof. The aim of procedure as it developed at the beginning of the thirteenth century was not just to decide the accusation of a plaintiff against another but to uncover whether there had been a crime at all and whether it was the defendant who had performed that crime. While the accusatory procedure depended on a judge's evaluation of the evidence produced by the opposing parties, the new procedure—which had been introduced into ecclesiastical procedure by the Fourth Lateran Council—meant that the judge now had the right, on the one hand to initiate a case if he suspected a transgression against the law and, on the other hand, to question the parties involved and their witnesses in order to establish truth. The development of inquisitorial procedure was linked to an increased burden of proof for the plaintiff, who now positively had to prove his accusation, and a greater emphasis being placed on those proofs that dealt with the matter in hand and not the trustworthiness of the parties. Thus greater emphasis was placed on substantial proof, such as individual depositions, written documentation and confessions. All these were methods of proof that we find the *sandemænd* dealing with from the moment when we start to have written sources about their activities.

The *sandemænd* appear to have been appointed for life: at least it is not explicitly stated by the Law of Jylland that their appointment was for a year or a term of years as was the case for other jurors. This may have been caused by two factors: that it was a difficult task to find suitable candidates locally and also a wish to ensure both their disinterest in the case and the experience of the *sandemænd* who were to evaluate and pass sentence for the most serious crimes. Thus the *sandemænd* could not be deposed unless they swore falsely against their better knowledge and thus perjured themselves. They would then lose their *hovedlod* (that part of the *fællig*, a private community of goods that belonged to the individual *sandemand*).⁴² They could

⁴² The *hovedlod*—the capital part—is a kind of unit of distribution that was utilized in cases of inheritance or gifts and donations. When a man died the capital part

be deposed if they took more in *hesteleje* ('horse rent', i.e. a 'transportation' fee for calling the *sandemænd* to decide a case) than they were supposed to. The *hesteleje* was one half mark silver to be divided amongst eight *sandemænd*, and this contribution to their sustenance should be a witnessed payment to them made at the *ting* by the person who craved their decision, that is by the plaintiff. There was one other case in which *sandemænd* could lose their *hovedlød*, namely when they refused to pass sentence when witnesses agreed that in the previous session they had been cited to evaluate a case according to the law and the *ting* had recognised their power by giving them a final mandate, the so-called *doom*, to pass sentence.

In chapter six of book two we learn "then a sentence must be passed that they must produce an oath. Without a sentence they are not to produce an oath"⁴³ and the *sandemænd* thus could not deviate from seeking the truth without the explicit command of the *ting*. The first sentence of chapter six of book two is however not found in the oldest manuscripts⁴⁴ and this indicates that later generations wished to emphasis the demand that the *ting* ordered the *sandemænd* to produce a sentence. This was in harmony with the later additions to and specifications of the contents of the Law of Jylland found in Thord's Articles which around 1300 introduced the so-called *fyllingsmænd* who were to witness that procedure had been adhered to so that jurors could be commanded to produce an oath.⁴⁵

As already mentioned, a sentence was sought amongst other things in cases of wounds—that is, cases where a plaintiff summoned another for physical damage to the plaintiff. In the Law of Jylland, as in other Danish provincial laws, there were fixed, i.e. already determined, fines based on the extent of the wound or wounds. But in two cases—when a body part was damaged but still had some use or when the plaintiff

was calculated on the basis of the number of heirs so that sons took a full part while daughters only took a half part. The distribution of inheritance by capital parts could also include the person leaving the bequest. If this person wished to donate lands or other property to others than his legal heirs he would take a part in the inheritance and have the right to freely dispose of half a capital part.

⁴³ See JL II 6. A more up-to-date translation is found in *Jydske Lov på moderne dansk*, eds. Ole Fenger and Chr. R. Jansen, *Jydske Lov 750 år* (Viborg, 1991) [hereafter *Jydske Lov*], pp. 243–286, esp. 258, compared to DGL II, pp. 147–148.

⁴⁴ See DGL II, p. 147, textual variants.

⁴⁵ Thords Arts. 8, 24 and 65. See Peter Skautrup, "Fylling på sandemænd", eds. Poul Andersen, Aage Hansen and Peter Skautrup, *Studier tilegnede Verner Dahlerup paa Femoghalvfjerdsdaarsdagen* (Aarhus, 1934), pp. 231–243.

had received permanent scars to his face—the wounds and the extent of damage were to be evaluated by ‘good men’ (*godhæ mæn*).⁴⁶ These good men were not necessarily the *sandemænd* since cases of wounding could be arbitrated without the participation of *sandemænd*,⁴⁷ but if they were called in to determine the case they also had to determine the extent of the damage. It appears that they were then free to determine the number of wounds that the defendant had inflicted. Although we learn from chapter 30 of book three that “*sandemænd* can swear a man [to pay a fine for] up to five wounds in one deed and not more”,⁴⁸ this limitation is not found in the oldest manuscripts,⁴⁹ which indicates that the *sandemænd*’s competence in such cases was even wider than that found in later editions.⁵⁰ Thus in the thirteenth century we see a certain dissatisfaction with the *sandemænd* that meant that their powers were limited by Thord’s Articles and by later editions of the law itself.

For the *sandemænd*, and apparently also for others involved in the case, there were few permitted excuses for not attending the *ting*, although there are more in the Law of Jylland than in any other provincial law: illness, lack of summons, royal service, pilgrimage, participation in higher courts or where a party was involved in disputes about land.⁵¹ For our purposes it is the excuse named in chapter 50 of book two—the participation in higher courts—which is interesting. This indicates a hierarchy of courts and of cases that we otherwise only find when a suspected thief has been sentenced at the *herredsting* but is not intending to follow their sentence. In this case a new case can be pleaded.⁵² Whether the *landsting* took precedence over the *herredsting* or whether cases of theft were less important than cases of killing is uncertain, and although we find later reports about a formally institutionalised royal court,⁵³ this may refer to a situation where the king in reality held the highest legal power.

⁴⁶ JL III 26 and III 29.

⁴⁷ See JL III 31.

⁴⁸ JL III 31, see *Jydske Lov*, p. 279.

⁴⁹ See DGL II, p. 417, textual variants.

⁵⁰ Riis, ‘Det ældste håndskrift af Jyske Lov’, also concludes that the original version of JL, which is most clearly seen in C 37, was more severe in its punishments—in this case because the *sandemænd* could swear concerning as many wounds as they wished.

⁵¹ JL I 50, II 7 and II 79 and II 109.

⁵² See JL II 107.

⁵³ See Lerdam, *Kongen og tinget*, pp. 12, 21.

The Bishop and the Best Bygdemænd

The Church seems to have held a considerable authority in connection with the office of the *sandemænd*. In chapter 7 of the second book we find that a case that is determined by majority amongst the *sandemænd* can be overturned by eight of the settlement's best and most reliable men and their bishop if they find that the *sandemænd* have acted against the letter of the law or have acted unlawfully. Danish historiography discusses the bishop and the best *bygdemænd* at great length, but in reality this chapter refers to the *bygdemænd* first and then to the bishop (*the bæstæ bygdæ mæn oc the sannæst attæ oc bischops*). For this reason it is natural to conclude that the expertise of the jury was found amongst the best *bygdemænd* while the bishop was added to the jury because perjury was a matter to be determined somewhere between secular and ecclesiastical jurisdiction. Furthermore, it is also found that

although they all [i.e. the *sandemænd*] swear to the same and it is a manifest perjury recognised by everyone to be perjury... then they may lose their *hovedlod* because truth must always be stronger and dearer than proof by oath. But if most good men in the *bygd* do not raise a case against them and they all swear the same what they have sworn is confirmed.⁵⁴

'Most good men of the *bygd* and the bishop' could thus intervene if they found that perjury had been committed in both majority decisions and in cases of unanimity.⁵⁵ The background for this institution is probably found in the fact that they wished to stamp out perjury by letting the bishop and eight laymen from the region reject a sentence that had been passed but which was questionable. The phrase *bygd* seems to have been used to designate an earlier administrative unit in Northern Jylland that was later replaced by the *sysse*⁵⁶ from which we derive the phrase *bygdemænd*. The introduction of a regional institution in this manner ensured that abuse of power and favouritism did

⁵⁴ JI II 7, see *Jydske Lov*, p. 258, and DGL II, pp. 150–151 (my italics).

⁵⁵ See Jørgensen, "Biskop og bedste Bygdemænd", p. 79, and Michael H. Gelting, "Magtstrukturer i Valdemarstidens Danmark", ed. Niels Lund, *Viking og Hvidekrist. Norden og Europa i den sene vikingetid og tidligste middelalder* (Copenhagen, 2000), pp. 179–205, esp. 192.

⁵⁶ See Vibeke Dalberg and John Kousgård Sørensen, *Stednavneforskning 2. Udnytelses-muligheder* (Copenhagen, 1979), pp. 48–52.

not determine cases locally. A decision was thus only of consequence when it had been accepted and not questioned by local society.⁵⁷

We must assume therefore that it was not a rare occurrence for jurors such as the *sandemænd* not to agree a decision in individual cases and therefore, during the twelfth century, the principle of majority decision as sufficient for sentencing was established. In many cases it was customary within the Church to establish a group of ad hoc judges to determine a specific case⁵⁸ and thus they had also encountered the problem within the Church of disagreement between judges. The principle of majority decision, based on Roman law principles, was established as a general rule at the Third Lateran Council of 1179.⁵⁹

With the principle established that a case could be determined by simple majority amongst judges or jurors, a new important means for determining cases more swiftly than by seeking unanimous decisions was established, thus meaning that the administration of justice was more efficient than before. The consequence of this policy was that it was only necessary to find a majority to determine a case and this in itself led to a greater risk of perjury and therefore it became urgent to find an institution which could protect against such an increased risk.

As an instrument of legal administration, the bishop and the eight best *bygdemænd*—whom the bishop, at least at a later time, selected from amongst the nobility of the *bygd* while peasants were more rarely selected⁶⁰—thus ensured that justice was just. It must have been of great importance for the bishop that the possibility of overturning a decision was available in cases where a serious breach of the law had been committed and also in those cases concerning boundaries and rights to land between lay and secular where the Church risked losing its property. We learn from the rules about the bishop and the best *bygdemænd* in the Law of Jylland that the best *bygdemænd* could indict the *sandemænd* if they found that they committed perjury, but whether they could intervene themselves or whether an appeal from one party or the other was necessary is not clear. We know from

⁵⁷ See K.G. Westman, *Den svenska nämnden. Dess uppkomst och utveckling* (Stockholm, 1909), pp. 129, 136–137.

⁵⁸ R.H. Helmholz, *The Oxford History of the Laws of England I: The Common Law and Ecclesiastical Jurisdiction from 597 to the 1640s* (Oxford, 2004), p. 337.

⁵⁹ See the classical analysis of Otto von Gierke, “Über die Geschichte des Majoritätsprinzips”, ed. Paul Vinogradoff, *Essays in Legal History* (London and Oxford, 1913), pp. 312–335.

⁶⁰ Jørgensen, “Biskop og bedste Bygdemænd”, pp. 89–92.

Thord's Articles that around 1300 a party who felt unjustly treated by the *sandemænd* could appeal to the bishop or the *bygdemænd*,⁶¹ but this does not exclude the possibility that the best *bygdemænd* could intervene if there was a *fama publica* that a decision had been based on perjury. Only later in the thirteenth century and around 1300 did the bishop and the *bygdemænd* become a general court of appeal that could hear all kinds of cases as a part of a general development of canon law.⁶²

The introduction of the institution of the bishop and the best *bygdemænd* indicates that from 1241 it was clear that some decisions were made on the basis of perjury by the jurors, even though there was an attempt from the central administration to tighten the administration of law and to make named sworn jurors such as the *sandemænd* personally responsible for the fulfilment of justice. Thus, in order to secure disinterested and correct decisions, a regionally based control was introduced over the locally based administration of justice, and this was not to the liking of all local magnates since they were now to have their decisions scrutinised when they decided cases or exerted pressure on those who were to decide cases of interest to the magnates.

The way in which the institutions of legal administration—the *sandemænd* and the bishop and the best *bygdemænd*—were organised is thus a good example of how different interest groups were accommodated in a complex system ensuring that everybody gained at least a little and therefore could accept those changes that were brought about by the new institutions. By having the right to appoint *sandemænd*, the king gained a firmer hold on the administration of justice locally in Jylland in comparison to the ad hoc juries that were characteristic of other legal provinces. By being amongst those who were eligible to be *sandemænd*, local magnates were able to continue their role in the local administration of justice. By introducing the institution of the bishop and the best *bygdemænd* the Church, the king and society in general made sure that unbiased decisions were made, undoubtedly

⁶¹ Jørgensen, "Biskop og bedste Bygdemænd", pp. 102–103, see Thords Art. 63.

⁶² See Eric Klipping's Statute for Northern Jylland from 1284 in DRL 1:15, § 4, where they appear as an appeal court in cases decided by the jurors of the *herred*, and Thords Arts. 21 and 22. That it was not until then that they functioned as a dedicated court of appeal agrees well with the general development of Church law, see Knut Wolfgang Nörr, "Ein Baustein der mittelalterlichen Rechtskirche: Die Appelatio extrajudicialis", ed. Knut Wolfgang Nörr, *Iudicium est actus trium personarum. Beiträge zur Geschichte des Zivilprozessrechts in Europa* (Tübingen, 1993), pp. 463–482.

to great satisfaction for those who previously had been subject to the hegemony of local grandees.

The Herredsnævn—Jury of the Herred

We find the same traits in a particular ad hoc jury that is mentioned in the last chapters of book three of the Law of Jylland, and thus seems to be established in the years between the promulgation of the laws in 1241 and the earliest manuscript of the law in 1276.⁶³ This was the so-called *herredsnævn* ('the jury of the *herred*') which was intended to provide an unbiased decision in cases of counterfeiting, arson and robbery.⁶⁴ The local ombudsman was to appoint three jurors from each quarter of the *herred*—which was a common task in connection with ad hoc juries⁶⁵—and from these twelve jurors the defendant could exclude those who were his known enemies but apart from this the decision of the remaining jurors was to be accepted. Amongst other things this meant that a person who was convicted of robbery was in the power of the king, which probably meant that he had to serve a prison sentence or forced labour.

It might be expected that these serious transgressions were to be examined under the jurisdiction of the royally appointed *sandemænd*, therefore the mention of the *herredsnævn* also gives the impression that it was a development intended to deal with cases that were not already subject to the *sandemænd*. The *herredsnævn* is also mentioned in the probably never publicly accepted Abel–Christopher Decree, which originated in the decade between 1250 and 1259 and which stipulated that the jury was to hear the cases concerning shipwreck.⁶⁶ Michael H. Gelting has argued that the jury then found its way into the Law of Jylland together with responsibility for those cases that were not originally regulated in it, which among other things meant shipwreck, counterfeiting, arson and *stimænd* (*latrones publici*), i.e. assault and robbery. According to Gelting, the reason why shipwreck was not originally part of the rules of *herredsnævn* in the Law of Jylland was

⁶³ See Gelting, "Skånske Lov og Jyske Lov", pp. 67–70.

⁶⁴ JL III 64–67.

⁶⁵ See for example the Statute of Ordeal by Hot Iron (*Jernbyrdsforordningen*) in DD 1:5:96, § 5.

⁶⁶ See DRL 1:7, § 21 (text 1, p. 46) and DRL 1:8, § 17 (text 1, p. 53). Thomas Riis, *Les institutions politiques centrales du Danemark 1100–1332* (Odense, 1977), pp. 58–59, argues that they were composed in the period 1252–1254.

that in connection with shipwreck, which seems to have been particularly problematical, a choice was made to incorporate rules from the Law of Skåne. Subsequently, the other issues, including *stimænd*, that were mentioned in the Abel–Christopher Decree, were to be determined by the *herredsnævn*.⁶⁷

Gelting's explanation of the background to the *herredsnævn* has much to commend it in connection with those sources that mention such a jury and the legal problems that are mentioned in connection with this jury. However, his explanation does not answer the fundamental question of why these types of cases were not given to the already existing *sandemænd* jury in preference to the introduction of a new legal institution. It is clear that three of these types of cases were part of the royal prerogative and the maintenance of royal peace, but in particular the latter was typical for the *sandemænd* so the explanation is probably not found there. It is thus very possible that these three transgressions, and to a certain extent also shipwreck, were not part of the responsibility of the *sandemænd* and this must be seen as an expression of an increasing scepticism towards the institution of the *sandemænd*—as is clear from the stipulation that the *sandemænd* were not to produce a sentence until they were allowed to do so and the introduction of *fyllingsmænd* to witness that proper procedure had been followed. This may indicate that the royal power sought to secure unbiased and just sentences, but had not been fully successful since the law was modified by new institutions and a new drive for consensus. Two opposing explanations can be offered as to why the *herredsnævn* were introduced rather than allowing the *sandemænd* to hear these kinds of cases.

Firstly, the royally appointed *sandemænd* may have faced opposition from local elites, which up to then had been able to promote their own interests and defeat their opposition by exerting influence on the legal system, for which reason they wished to leave as little as possible to a decision by *sandemænd*.

Alternatively, the same local elites may have been those from amongst whom the *sandemænd* were appointed but they did not pass unbiased decisions, for which reason the rest of society including the royal power did not wish to transfer more responsibility to them and therefore introduced a new kind of jury consisting of ad hoc appointees.

⁶⁷ Gelting, "Skånske Lov og Jyske Lov", pp. 67–70.

Jurors

One step down from the serious transgressions that were heard by the *sandemænd* and later the *herredsnævn* we find less serious (but possibly equally violent) crimes, namely theft and *ran*. In the Law of Jylland and the other Danish provincial laws, a distinction is drawn between these two crimes. Theft is conducted in secret—and therefore it did not include any kind of violence. *Ran* is the open and therefore possibly violent appropriation of goods from another person.⁶⁸

The jurors who were to decide cases of theft and *ran* and determine whether the defendant had accidentally come into possession of the disputed goods—that is that he was ignorant of a theft—are known in the legal history literature and in documents concerning the practice of the courts as *ransnævninger* (jurors of *ran*).⁶⁹ In the chapters that deal with *ran* and theft they are actually only mentioned as jurors (*næfning*), which is the term that I shall be using. Chapters 39 to 114 of the second book of the Law of Jylland, i.e. most of book two, describe the responsibilities and the cases in which the jurors must produce an oath. These many chapters fall into four almost equal parts that deal with: 1. the selection of jurors, their installation in the office, tasks and activities; 2. procedural rules for *ran* and theft; 3. rules for the so-called ‘bishop’s jurors’ (to which we will return below) who decide whether a *ran* or theft was sacrilegious, i.e. if it took place on a holy day or in a consecrated space; and 4. rules for the jurors’ and the ombudsman’s activities in cases of theft (not ‘*ran*’).⁷⁰

We learn that every *herred* had to elect and install eight jurors, two from each quarter of the *herred*. Jurors could be elected from amongst the three marks men and *adelbønder*, that is peasants who lived in villages but not the adjacent hamlets created by the voluntary removal of peasants who wished to be closer to their lands (these are known in Danish as *torp*). The three marks men and *adelbønder* could be elected as jurors whereas the *bryder* and land-dwellers could not be

⁶⁸ Jørgensen, “Tyveri og Ran”, pp. 183–184.

⁶⁹ See JL II 6. The so-called shipsjurors, *skurds* or shipsfines jurors, appear to share common traits with the *sandemænd* and jurors, but they will not be treated in this connection because of their special association with the *leding*, i.e. the public defense at sea, see JL III 1–20.

⁷⁰ Introductory general rules for jurors’ activities can be found in JL II 39–60, and when nothing else is noted these rules are the basis of my analysis. JL II 61 explicitly says that debt cases are not jury cases.

because they did not participate in the *landeværn*, that is paid tax for the defence of the country,⁷¹ nor could they defend themselves in a court case. Thus the demands of the jurors' background appear to have been stricter than for the *sandemænd*, to which group the king could appoint *bryder*, but this can be explained by differences in selection procedure. It was mainly peasants in each quarter who appointed the jurors and in order for these to enjoy a certain local authority it must have been necessary for them to have a certain social standing.

Only in the case when peasants in the quarter or a majority of them could not agree about a candidate did the king's ombudsman have the right to appoint one. This may have been a common occurrence, as is indicated by the rules of the law, because all peasants in a quarter were obliged to hold the office as a juror at one time or another and their refusal to take up this office incurred a fine. This indicates that there was a widespread resistance to taking up the office because it was further decided that every time a peasant refused to take office he had to pay a fine of three marks, and this could continue until the day when he was so poor that he could no longer pay the fine. If a retiring juror wished to continue for another term, he was welcome to do so even though everyone in the quarter had not yet served as juror.

The many rules intended to counteract the peasants' refusal to take up the office of juror reveal that this was a common occurrence when these chapters were written down. The rules for peasants' duty to serve as juror seem to have been the result of past experience and, as was the case with the *sandemænd*, we must tentatively suggest that the institution of the jury that heard theft and *ran* was known when the Law of Jylland was published in 1241.

The jurors served one year at a time and the peasants of the quarter were to produce two jurors at the first *herredsting* to be held after the twelfth day of the year. These two were to serve for the coming year. If a juror died during his year of service or lost his social status or went on pilgrimage or disappeared from the *herred*, the members of the quarter were to nominate a new juror. It is natural to assume that this would also have been the case if the juror was absent due to royal service or similar because the comparatively short period of service does not seem to have caused further consideration of their absence from a court case, as was the case for the *sandemænd*. On the other hand, the

⁷¹ C.A. Christensen, "Landvärn, Danmark", *KLNM* X, cols. 305–308.

reasons for absence that are mentioned for the *sandemænd* must also have been valid for jurors otherwise jurors could simply have stayed away in cases where they did not feel attendance and sentencing was to their advantage.

Cases of *ran* and theft appear to have been the exclusive domain of the *ting* of the *herred* in which the defendant owned land. We saw earlier in our discussion of the *sandemænd* that they should have the *ting*'s 'doom', that is a mandate to swear an oath and thus pass a sentence, and something like this is also found in the activity of the jurors. In one of the newer redactions of the Law of Jylland we learn in chapter 41 of book two that the jurors are to "take counsel from the best men of the *herred* *whether they shall swear an oath or not* or about the content of their oath."⁷² According to this chapter, the jurors were to hear from the best men of the *herred* whether they were to make a decision *at all*. Thus in this way the inhabitants of the *herred* received a great concession. In reality they could decide that a case should not conclude with a final sentence. The interesting thing is that the italicised part of the quotation is not to be found in the oldest manuscripts.⁷³ Just as was the case in connection with the *sandemænd*, the local population's powers to halt a case before sentencing was considerably increased in the later editions, but in 1241 the jurors were obliged to swear an oath *after* they had consulted with the best men of the *herred*.⁷⁴ Thus in the cases of *ran* and theft, the jurors, who were locally elected representatives for the *herred* and owners of their own land, ensured that the institution of the juries could function locally since they, so to speak, expressed the opinion of the local community—but they were obliged to pass sentence.

In the same chapter 41 we also learn that jurors could forfeit their *hovedlod* if—apparently after having consulted the best and most men in the *herred*—they took an oath contrary to what had been decided by these men. In such a case, the punishment was similar to the one imposed on *sandemænd* who openly perjured themselves, and this has been interpreted by some legal historians to mean that most good *herredsmen*'s rights to go against the decisions of the jurors only came into force where such a decision had been made unanimously. Fur-

⁷² JL II 41 in *Jydske Lov*, p. 264, see DGL II, pp. 215–216 (my italics).

⁷³ See DGL II, pp. 215–216, textual variants.

⁷⁴ Jørgensen, "Biskop og bedste Bygdemænd", pp. 79–80.

thermore, chapter 41 says “*even though* they all swear the same”⁷⁵ they can forfeit their *hovedlod*, and this indicates that the *herredsmen* could intervene *even* in cases where it was only a majority of jurors who took an oath against the decision of the best *herredsmen*. This also means that in cases decided by a jury a majority decision could be made, as is clear from Thord’s Articles from around 1300.⁷⁶

This interpretation is supported by a rule governing what to do in cases of a hung vote between the jurors. According to chapter 54 of book two, three jurors were to be summoned from the nearest *herred* and the decision reached by two of these was to be considered final.⁷⁷ If the *herredsmen* were not allowed to intervene in cases of majority decisions the possibility of letting local society have a say in legal decisions would thus have suffered by the rule in chapter 54 that allowed even outsiders to decide the case. And if a majority of the *herredsmen* could overturn a unanimous decision, why should they not also be able to do so to a majority decision? If the best men of the *herred* or the *bygd* had the right or the power to object to a sentence that had been reached unanimously, it is unlikely that they would have accepted the renunciation of this right in the case of majority decisions made by jurors. For in reality they shared this right to overturn a majority decision by the *sandemænd* with their bishop. The decisions of chapters 41 and 54 of book two must therefore be interpreted to mean that the *herredsmen* had the right to overturn a majority decision by jurors, and that the jurors were obliged to temper their decision to match local perceptions. And when the bishop did not have a role in connection with the decision of the jurors, this was undoubtedly because cases heard by jurors were of lesser significance than cases heard by *sandemænd* and therefore the bishops did not wish to be called to the *herredsting* for minor cases—the difference between the bishop’s role in the decisions of the two types of juries can thus be understood from a purely practical point of view.

In reality, the last feature—that jurors discussed how they would pass sentence with the best men of the *herred*—meant that there was a tendency towards unanimity or a split jury with sides of equal sizes because it is difficult to imagine that a small minority was able to go against the

⁷⁵ JL II 41 in *Jydske Lov*, p. 264, see DGL II, p. 216 (my italics).

⁷⁶ Thords Art. 21, 25 and 63. See also Jørgensen, “Biskop og bedste Bygdemænd”, p. 87.

⁷⁷ JL II 54.

decision of both the majority and the best men of the *herred*. The medieval administration of justice, as it appears in the Law of Jylland, must thus almost be characterised as consensus seeking, with the local *ting*'s role being that of rubber stamping already decided cases.

The question then remains: how must we interpret the influence of the men attending the *herredsting*? Was it an expression of a locally active hierarchy of power or did it provide an instance of appeal that in the last moments could reject a case so that there was not a sentence, for example because there was a suspicion of perjury based on local knowledge?

At first glance, the royal and ecclesiastical acceptance of the right of the local *ting* to disregard a sentence that had already been passed seems to indicate a clear lack of royal power locally. Such an interpretation has much to commend it and it can hardly be doubted that, given the opportunity, the king would have liked more influence over local administration of justice than is found in the Law of Jylland. The same is probably the case for the Church if the case was of interest to it. However, such a interpretation, focused purely on power in the relationship between the king, the bishop and the *herredsting*, would probably not give the medieval Danish administration of justice its full due—what we see here was in fact to a very large extent in accordance with the Church's administration of justice.

The jury institution itself seems to have been the solution to the problem of proof that had become apparent since the Fourth Lateran Council of 1215 had rejected so-called Divine Judgement in which the accused tried to prove his innocence by letting God intervene—in Denmark by carrying red-hot irons for a certain distance. The rejection of this method of proof in serious cases led to an acute need for new ways to determine legal disputes, particularly for secular rulers: when the Church's support for the previously used means of proof had fallen away the argument that they provided God's sentence in the case had become void.⁷⁸

In general, the need for new methods of proof and new legal institutions to evaluate such proof was met by an increased use of juries, i.e. a group of elected or ad hoc appointed men who had been sworn in for

⁷⁸ For a more detailed analysis of the development of the jury institution in Denmark, see Per Andersen, "‘Truth must always be stronger.’ The development of the *næmnd* in the Danish Medieval laws", ed. Stefan Brink, *Scandinavian Provincial Laws—Between Local Customs and European Traditions* (Turnhout, 2011—forthcoming).

that particular case to represent society; these men were supposed to find the truth in a given matter by evaluating the evidence produced. Although locally based juries are known from several places in the twelfth century, it is typical for these legal institutions that their development culminated in the thirteenth century. In England this most likely happened in the years 1218–1222 when it was decided that the royal judge was in reality only meant to confirm an evaluation made by a locally based jury because the members of the jury, with their local knowledge, were presumed to know more about a given case than the royal judge. It was precisely the local base of the jury that was seen as particularly important because through it the local community supported a given decision in a case and this was in the final analysis necessary if the king was to live up to his role as the protector of laws.⁷⁹

In terms of the administration of justice for the Church, the rejection of Divine Judgement did not have the same immediate consequences and this was of course because the carrying of irons was only rarely used in cases that interested the Church or over which it had influence. Another explanation of this fact though can also be found in the fact that within the Church a new kind of procedure had developed, i.e. the inquisitorial procedure, which was made manifest in canon eight of the Fourth Lateran Council.

At the same time that it introduced the principle of majority decision (*major pars*), the Church also introduced a demand, amongst others in the *Liber Extra* of 1234,⁸⁰ that a decision had to be agreed by the most sensible part of a gathering, i.e. those whose votes had the greatest significance (*sanior pars*).⁸¹ In the secular local sphere, this would indicate the ‘best men of the *herred*’.⁸²

With the two chapters in the Law of Jylland that deal with the *sandemænd* and the jurors’ right and duty to pass sentence and their community’s possibility to reject their decision if perjury had clearly been committed, the Church thus satisfied its wish for a more effective legal procedure by introducing majority decisions in contrast to earlier times where it may have demanded unanimity. At the same time, the crime of perjury, which received increased emphasis from the Church

⁷⁹ See Groot, “The Early-Thirteenth-Century Criminal Jury”.

⁸⁰ See X 5.1.24.

⁸¹ See Gierke, “Über die Geschichte des Majoritätsprinzips”.

⁸² See Jørgensen, “Biskop og bedste Bygdemænd”, pp. 84–86.

because of its efforts to transform secular law in accordance with more Christian moral ethical norms, was now also made the occasion for a secular punishment, namely the forfeit of a *hovedlod*—a secular punishment for a (moral) crime committed by a secularly appointed and secularly active juror. In other words, the extent of the inner sin that perjury was now entered the public space as part of the secular penal code. This was a development that was entirely in keeping with the development of canon law.⁸³

Through the introduction of juries the king also gained a foothold in this more effective administration of justice—both as the one who ‘gave’ the law and named the jurors and as the one who had the executive function since it was both his ombudsmen who punished perjury committed by the jurors and he who stood to gain financially from such perjury since the perjurer forfeited his *hovedlod* as a fine.⁸⁴ Local *herredsmen* probably also gained by the introduction of fixed juries and majority decisions for they too must have been aware that many manifest crimes had not been punished because the defendant could attest to his innocence through compurgation or because the local elites influenced the decision, maybe even the decision to prosecute. With the introduction of the possibility of rejecting a sentence that had already been passed, the best men of the *herred*—learned in law, powerful, landowners (maybe even the local clergy)—realised that they stood to gain in comparison with the previous system—or that they at least did not lose influence by the introduction of juries and by their now stated rights to change sentencing if it was in contradiction of their knowledge and interpretation.

Thus it was not really the case that there was a power struggle with winners and losers, but instead there was a compromise from which all parties stood to gain. This also meant that, according to the Law of Jylland, there was no formal way to appeal. Usually a sentence was to stand when there was no manifest perjury and sentences for *ran* or theft were imposed according to the findings of the majority of the *herred*. It is only later, towards the end of the thirteenth century that we find a practice of appeal, even though the brief mention in the Law of Jylland of ‘a higher court’ seems to indicate that there was a higher

⁸³ See the classic Stephan Kuttner, *Kanonistische Schuldlehre von Gratian bis auf die Dekretalen Gregors IX: Systematisch auf Grund der handschriftlichen Quellen dargestellt* (Studi e Testi 64) (Città del Vaticano 1935).

⁸⁴ See JL II 78.

sentencing institution than those mentioned by the law code, presumably presided over by the king.⁸⁵ It is not until one of the chapters that were added later that the Law of Jylland mentions the possibility of obtaining the king's grace (contemporary Danish: *nåde*; Old Danish: *nathæ*)⁸⁶ and a royal court is not mentioned until a document from 1282.⁸⁷ Thus the institutional administration of justice as we find it in the earliest version of the Law of Jylland seems to have been very flat: whichever court one approached to hear a case also decided it and it was only in extreme cases that litigants could hope that the decision would not be recognised and therefore either rejected or a new case be initiated.⁸⁸

Bishops' Jurors

In the middle of the chapter on jurors—when a distinction is drawn between cases of *ran* and of theft—mention is made of a kind of a juror that falls somewhat outside the picture I have drawn so far. These are the so-called 'bishops' jurors'.⁸⁹ These jurors, who were appointed by the *sognemænd* ('parish men') in each parish or every quarter, were to take an oath in cases concerning sacrilege, i.e. concerning violence either on holy days or committed against clergy and in cases that dealt with church property to the value of three marks.⁹⁰

The bishop's jurors who, like the *sandemænd*, are first found in King Valdemar's arbitration concerning sacrilege from 1228 in a case between the bishop of Odense and the inhabitants of Fyn,⁹¹ were supposed to take office for only one year at a time, like other jurors, and in the same way they could also be made liable for swearing incorrectly, for which transgression they would lose their *hovedlod*. They were sworn in by the ombudsman and if the two bishop's jurors of

⁸⁵ See Lars Hamre, "Rettarting", *KLNM* XIV, cols. 101–103.

⁸⁶ *JL* III 66.

⁸⁷ *DD* 2:3:21.

⁸⁸ This is clear from *JL* II 21, see *DGL* II, pp. 178–179: "...æn ær nokær minnæ til at förræ war sworæt vm. oc linær nokær man af the thær sworæ. tha scal thæræ æi meræ vm swæræs." This sentence is found in the older Flensborg manuscript, but is added by a later hand, see *DGL* II, p. 179, textual variant.

⁸⁹ The rules for bishop's jurors can be found in *JL* II 79–85.

⁹⁰ *JL* II 78. This has been changed to ½ mark in later editions, see Riis, "Det ældste håndskrift af Jyske Lov", p. 50.

⁹¹ *DD* 1:6:79.

the parish disagreed with each other the case was to be decided by a bishop's juror called in for that purpose from the nearest parish.⁹²

Against the background of the Church's concern with intentional sin or accidents we might have expected that when a case determined whether an action was accidental or intentional it was to be decided by the bishops' jurors. However, the Law of Jylland continues a tradition that is also found in other Danish medieval laws by allowing the decision concerning intentionality to be decided by those jurors who were already evaluating the evidence, for example the jurors in cases of theft and *ran*, the bishops' jurors in cases concerning sacrilege or the *sandemænd* in cases of wounding.⁹³ In all these cases, the defendant was not commanded to pay a fine to the bishop or the king if he could prove that he had acted in good faith or that he had been acting without due regard to the consequences.⁹⁴

There is another aspect of the bishops' jurors that is similar to secular juries. In the Valdemar's arbitration it is a basic point that no one can contradict or reject the decision of the bishops' jurors unless he can persuade twelve men present at the *ting* to swear an oath that no sacrilege had been committed. If this proof failed, he had to pay three marks to the bishop for the attempt.⁹⁵ The Law of Jylland does not mention such a rule, but it is likely that the situation in 1241 was similar to the situation in 1228 because the Law of Jylland appears to hold the bishop's jurors responsible to the bishop for their decision. In any case, the question of sacrilege was to be decided by the Church and in front of God—even when the case had been initiated at the *ting*—for which reason the local priest must have decided whether to reject the decision. In Valdemar's arbitration, the bishop is awarded half of the income from the loss of a *hovedlod* forfeited by a bishop's juror for committing perjury. This is because in his arbitration King Valdemar gave his permission for the bishop's official, i.e. his ombudsman, like the royal ombudsman, to enjoy the right to swear in the bishop's jurors.⁹⁶

⁹² JL II 77–78.

⁹³ See JL II 39. See JL II 39, II 71–72, II 48 and III 36, II 71–72, II 48 and III 36.

⁹⁴ See also JL II 34–35.

⁹⁵ DD 1:6:79.

⁹⁶ DD 1:6:79.

The Jurors' Decision—Sentence or Evidence?

I may have given the impression in the above that the juries passed sentence, i.e. that they weighed evidence and counter-evidence produced before the court. However, the sentencing power of the jurors is far from being a settled point in the discussion of Danish legal history and many scholars have objected that the jurors' findings were primarily to be regarded as evidence, although significant evidence, since they were only to swear (*swæræ* or *skiliae*) and not to pass sentence (*dømæ*).⁹⁷ In my opinion, at least the juries known from the Law of Jylland passed sentence in practical terms because the Law of Jylland does not contain any provision for final sentencing by a higher institution, i.e. they passed a sentence that meant that a sanction was imposed. The final step of any procedure mentioned by the Law of Jylland is that the jurors swear: they produce an oath that they stand by the result to which their investigation of the truth has lead them. According to these rules further procedural steps were only taken in cases of manifest perjury or where the decision went against the perception and knowledge of the local community—and then the procedural steps were only taken against the jurors. If the evaluation of the jurors was only one piece of evidence amongst others, it is hardly believable that the *ting* and the king might question this proof when they did not do so for other methods of proof. It makes more sense that the men of the *herred* meeting at the *ting* weighed up whether they could recognise the findings and thus the sentence than whether they could recognise a single proof. And in terminological regard, the language of the Law of Jylland and later Nordic medieval provincial laws bear witness to the fact that legal disputes were only decided by sentencing.⁹⁸

I have already mentioned above that a finding or a sentence could be decided by a simple majority amongst the jurors, but one more example can be produced to substantiate this point. In cases where disputes arose about boundaries between all types of land, for example private land and public land, i.e. land to which no one had right of use, twelve men were to be named in the village who were to decide by simple majority where borders lay. In cases of a split decision another three were to be named in order to break the deadlock by

⁹⁷ See for example Jørgensen, "Biskop og bedste Bygdemænd", pp. 77–78, and Westman, *Den svenska nämnden*, pp. 128–131, 135–138.

⁹⁸ See, *Altnordische Rechtswörter*, pp. 101–102, 174, 187.

simple majority.⁹⁹ Furthermore, in both the oldest and the more recent manuscripts of the Law of Jylland we learn that “even though there are additional jurors, what the *first* jurors decided must remain”.¹⁰⁰ That is, what has already been decided cannot be changed. But this principle seems to be less important than the principle of majority decisions in some of the manuscripts, including one of the younger redactions and some of the oldest manuscripts—amongst these the very oldest text of the Law of Jylland where the word ‘most’ is added in a later hand¹⁰¹—because here we read that “even though more jurors join what was decided *by most* will stand”.¹⁰² Thus it appears that there was a stricter administration of justice in the older version. Originally a sentence that had been passed was final, but this principle was modified by the introduction of majority decisions.

With this not-insignificant point having been made, I will now briefly analyse what the provincial laws tell us about the institutions that had executive powers.

Executive Functions—The Ombudsman

Executive functions are only rarely mentioned and both The Book on Inheritance and Heinous Crimes and Valdemar’s Law for Sjælland give the distinct impression that these functions originally rested with the litigating parties. There were only two instances in which the local royal representative administered justice: when the royal *bryde* apprehended a defendant (probably when there was reason to believe that he would abscond), and when the same—now referred to as an ombudsman—could demand an evaluation of the extent of wounds against the will of a defendant even though the case might have already been heard and decided by the *landsting*.¹⁰³

The same examples can also be found in the Law of Skåne, where private individuals usually executed the law, for example by binding

⁹⁹ JL I 52.

¹⁰⁰ JL I 52 in *Jydske Lov*, p. 254, see DGL II, p. 123 (my italics).

¹⁰¹ Several of the medieval Danish manuscripts are published in facsimile in *Corpus Codicum Danicorum Medii Aevi*, 10 vol., gen. ed. Ioannes Brøndum-Nielsen (Copenhagen, 1961–1973) [hereafter *Corpus*]. Here, see *Corpus X*, ed. Peter Skautrup (Copenhagen, 1973), fol. 19 v.

¹⁰² See DGL II, p. 123, textual variants.

¹⁰³ See A & O III 13 and IV 10 and ÆR 163 and YR 60 and ÆR 100–01 and YR 31–32.

a thief who had been caught red-handed to lead him to the *ting* or searching his property themselves.¹⁰⁴ If we disregard the later additions contained in book three, this situation also prevailed in Eric's Law for Sjælland, but the royal ombudsman had a few extra responsibilities, namely to intervene when a *fledføring* (someone who had entered into a contract of maintenance and thus transferred their legal rights to another) did not receive the alimony he or she had been promised as part of their contract and, in addition, the ombudsman was the person to whom royal fines were to be paid.¹⁰⁵

The Book on Inheritance and Heinous Crimes and the oldest provincial laws have no fixed terminology for royal officials. They are mostly referred to as *bryde* and ombudsman (in later manuscripts they are referred to as *ombuds-* or *embedsmand* and *embedsmand* or *foged*).¹⁰⁶ It is clear, however, that the term *bryde* is older than the rest.¹⁰⁷ We do not find a similar lack of precision in terminology in Anders Sunesen's Paraphrase of the Law of Skåne, which consistently refers to the ombudsman as *exactor*, a term that is known from the end of the eleventh century, while the common magnate's or peasant's *bryde* is referred to as *villicus*.¹⁰⁸

In the Law of Skåne the royal ombudsman's office depended on his presence in the local royal manor¹⁰⁹ and in several instances the ombudsman is also referred to as the king's *bryde*,¹¹⁰ i.e. the king's supervisor or steward.¹¹¹ Thus it appears that the office of the ombudsman developed from the *bryde*'s original role of steward of royal manors, and in Danish the word *ombud* means a right to perform certain legal actions for another, i.e. by proxy.¹¹² In other words, the royal

¹⁰⁴ See SkL 135–39 and 141 and 159. According to ASun 85 two witnesses must depose concerning the theft.

¹⁰⁵ ESL I 41 and II 51. On the other hand he is not necessarily the one who puts on the irons, that is apprehends a defendant, see ESL II 21, this action apparently could still be performed by a private party.

¹⁰⁶ See for example the textual variants in DGL VII, pp. 82, 97.

¹⁰⁷ See Riis, "Villici og coloni". A *bryde* in A&O, for example, becomes an ombudsman in the corresponding chapters of ÆR 163, see DGL VIII, p. 79.

¹⁰⁸ See ASun 67, 76, 95, 100 and 101 and 109 for a distinction between these. See Herluf Nielsen, "Ombodsmann, Danmark", *KLNM* XII, cols. 597–598.

¹⁰⁹ See SkL 130, 164, 165 and 166 and ASun 76.

¹¹⁰ SkL 171, 173 and most clearly in 163. Chapter 163 in one of the later manuscripts designates him *foged*, which is the more common term in the fourteenth and fifteenth centuries, see DGL I.1, p. 130, textual variant.

¹¹¹ See Fridlev Skrubbeltang, "Bryde", *KLNM* II, cols. 269–272, esp. 269.

¹¹² Kåre Lunden, "Ombodsmann, Norge", *KLNM* XII, cols. 593–597, esp. 593.

steward, in time, gained royal authorisation to do more than merely administrate the farm. We must assume that originally the royal *bryder* were only in charge of the day-to-day running of the royal manor and its appurtenances, but that in time these manors developed into centres for local royal administration and the raising of taxes.

It was probably also in the royal manors that ombudsmen were to detain an accused thief or store the flotsam and jetsam that from time to time was due to the king as part of the royal prerogative.¹¹³ In addition to these somewhat passive tasks, the ombudsmen that we find in Skåne seem also to have been charged with the raising of *wergild*—at least until Valdemar II's *Ættebodsforordning* laid down that this was the responsibility of the criminal.¹¹⁴ The ombudsman was also given the right to summon a person for allowing a thief to escape from custody or for allowing his cattle to graze in a field belonging to the king and to reject a claim of accidental wounding.¹¹⁵

In the latter case, the ombudsman's objection could only be rejected when the person who wounded and the person who was wounded plus ten randomly chosen jurors swore that the wounding was accidental. Incidentally this was the only case in which a jury was asked to decide whether the 'king's law' was to apply, that is whether the king was to receive a fine for the wounding.¹¹⁶ In addition to ensuring that thieves were held safely in custody until their cases were decided, the royal ombudsman at the beginning of the thirteenth century could only initiate cases when fines for wounding were to be paid to the king and the ombudsman suspected that a due fine had not been paid with accidental wounding being used as the excuse.

In a few cases, the Law of Skåne mentions the archbishop's ombudsman or *bryde*¹¹⁷ with powers similar to the king's ombudsman and *bryde*, and these rules are also known from the Church Law for Skåne.¹¹⁸ Anders Sunesen speaks of the episcopal ombudsman/*bryde* as the *exactor* or *villicus* and grants the archbishop's ombudsman the power of raising a case when the ombudsman's own estates are

¹¹³ SkL 166. The ombudsman's duty to gaol a suspected thief is found in SkL 163 and ASun 95.

¹¹⁴ See ASun 45.

¹¹⁵ SkL 163, 173 and 108.

¹¹⁶ SkL 108. The requirement for ten jurors is not mentioned in the older versions of SkL, but is mentioned by ASun 67, see DGL I.1, p. 81, textual variant.

¹¹⁷ SkL 171 and 173.

¹¹⁸ SkKl 11 (text 1), SkKl 19 (text 2) and text 3 (which is not divided into chapters).

involved.¹¹⁹ However, the archbishop quite clearly goes too far in his interpretation of the wording in the Law of Skåne chapter 108 when he gives the bishop's ombudsman the same right enjoyed by the king's ombudsman to initiate a case in cases of accidental wounding in the Paraphrases chapter 67—and that is done without the archbishop's ombudsman being mentioned in any capacity in the Law of Skåne's chapter 108. This can of course be caused by the fact that the bishop's ombudsman actually did enjoy this right but it is just not mentioned in the Law of Skåne because of a scribal error.¹²⁰ It is however more likely that we see the archbishop indicating that the question of accidental or intentional wounding ought to be a case for the Church. In contrast to earlier practice aimed at determining objective liability and compensation, the Church at this time, as already mentioned, wished to allow the intention of the culprit, his moral condition and mental capability determine the degree of guilt, and therefore the local churches strove to strengthen their influence over the evaluation of whether the law had been broken intentionally. While the principle of balance and objective guilt continued to dominate secular law—which includes the Law of Skåne—the learned doctrine of a subjective guilt had started to appear.¹²¹

From the end of the twelfth century to the middle of the thirteenth the terminological fluidity of the office of the ombudsman seems to have changed. In the Law of Jylland the terminology is fixed because here we only find one officer, the *umbotz man*. In this law code given by the king, the ombudsman is mentioned as the royally appointed local tax-collector—at least the ombudsman, according to the Law of Jylland, could also function as the *styrismand*, whose job it was to fill this function.¹²²

That the ombudsman was limited geographically is clear from several instances that stipulate that if he did not act correctly he stood to lose his *lææn*, that is his *len*, which here should probably be understood as

¹¹⁹ ASun 109.

¹²⁰ SkL 137 stipulates that a freeman who has been forced to manacle a thief shall not be accused or fined by the king's law, i.e. pay three marks for this. Two earlier manuscripts and one slightly later manuscript have added that the archbishop has the right to such a fine, see DGL I.1, p. 103, textual variant.

¹²¹ See esp. ASun 46, see SkL 113.

¹²² See JL III 3.

the district of his office.¹²³ Indeed, he was not even allowed to transfer the *len* or a part of the administration of justice to others.¹²⁴ Because of the close association between the *herredsting* and the ombudsman that we find in the Law of Jylland, the ombudsman's *len* probably coincided with the *herred* or included several *herreder*, and his fee for this office may have been a right to use some of the royal lands and their profits—possibly with a share of the fines that he was to raise on the king's behalf.¹²⁵

According to the Law of Jylland, one of the most important tasks of the ombudsman was to hear the oaths taken by jurors serving on permanent juries.¹²⁶ Even though he did not appoint the jurors—a power that was later granted to him in connection with the juries of the *herreder*¹²⁷—the fact that jurors swore an oath to the ombudsman can be seen as a reflection of the fact that jurors exercised their duties subject to his authority. This, despite the fact that he did not—like his colleagues in other parts of Europe—have final say over their sentencing.¹²⁸

It seems that the draft statute by King Abel (r. 1250–1252) may have been intended to grant sentencing powers to the royal ombudsman in 1251,¹²⁹ but this draft was never recognised and therefore there was no formal authorisation of the ombudsman's power of sentencing. During the 1250s, new terminology (*foged* and subsequently *lensmand*) was developed for royal officials with executive powers, but originally these officials do not seem to have had any sentencing powers.¹³⁰

The Law of Jylland only mentions the ombudsman in book two in sections dealing with permanent juries. Apart from his role in collecting fines and instating jurors, he appears to only have had an immediate visible role in cases of *ran* and theft where he could apprehend

¹²³ JL II 53, II 88 and III 3. This threat is repeated by later chapters in JL III 62 and III 63. Jørgensen, *Dansk Retshistorie*, p. 285, refers erroneously to JL II 54 and II 89; the correct references should be to JL II 53 and II 88. The Danish *len* is not comparable to the German *Lehen*, because in the Danish *len* the king's right to appoint and dismiss any official remained intact.

¹²⁴ JL II 55.

¹²⁵ In only two places does it appear that fines go to the ombudsman, namely JL II 51 and II 103.

¹²⁶ JL II 4, II 50 and II 77.

¹²⁷ JL III 64.

¹²⁸ Gelting, "Magtstruktur", p. 190.

¹²⁹ See DRL 1:7, § 8.

¹³⁰ Nielsen, "Ombodsmann, Danmark".

the suspect, i.e. put him in jail, or hang the thief immediately with no trial if the value of stolen goods amounted to more than half a mark.¹³¹ In addition, he also had the power to institute proceedings in cases of sacrilege, which he could also do in cases of theft, although according to chapter 90 of book two he had to wait for the injured party to initiate proceedings first.¹³² Thus the ombudsman may have had more powers in the Law of Jylland than in other earlier collections of law but the Law of Jylland is not the decisive break-through.

This break-through came in book three of Eric's Law for Sjælland, which grants the royal ombudsman a number of powers not seen before in Danish sources. In no other Danish source do we see such a concentration on the ombudsman as the local representative of the king.

The first example is the question of whether the ombudsman, as an office-holder, can initiate proceedings. Book three of Eric's Law for Sjælland informs us that the ombudsman has the right to do this in specific instances:

He can demand the payment of a fine from a plaintiff who has initiated a case and subsequently abandoned it in contradiction of the law. In this case, the ombudsman defended the king's right to fines, at least partially because it could also be a sanction against frivolous cases that were seen as a nuisance for the legal system.

He can represent people who were unable to represent themselves, the so-called *personae miserales* in canon law.¹³³ The ombudsman was here acting for the king as a guardian for those who did not have another guardian, maybe because the husband or father was abroad and thus the ombudsman took over the contact of the case.¹³⁴

The same is the case when the ombudsman has the possibility of raising a case if the *ting* and witnesses declare that a transgression against the law has taken place, i.e. he can act on the basis of such declarations. In such cases he may initiate proceedings not just against single persons but even against entire cities¹³⁵ and this kind of case is particularly interesting because the ombudsman in these cases almost

¹³¹ See JL II 62, II 63, II 86, II 88, II 91 and II 102 and II 87. In addition he could be called to attend the ransacking of the house of the suspect, see JL II 96.

¹³² JL II 90.

¹³³ See A. Erler, "Miserales", *HDR* III, cols. 597–599.

¹³⁴ ESL III 48, III 49 and III 53.

¹³⁵ See ESL III 49 and III 64.

has the powers of an inquisitor. In this section of Eric's Law for Sjøland, the royal ombudsman is a party or plaintiff to a case.¹³⁶

The second example deals with the ombudsman's role as the initiator of cases. In chapter 49 of book three, we learn that the public announcement of cases of wounding and *ran* had to take place at the king's manor, i.e. before the ombudsman, and then at the *ting*. However, according to book two, chapter 50, the public announcement of a murder not only had to take place first but exclusively at the *ting*.¹³⁷ Even though the two are not the same, the difference in procedure between them reflects a fundamental disagreement about where charges related to serious transgressions against the law should be raised and it is likely that the rules of book three, chapter 49, originated in a time when the king could claim—or tried to claim—a larger role in the administration of justice than was possible for him to claim at the time of the composition of book two.

This difference indicates a significant upgrading of the ombudsman as an institution for the administration of justice because, once a case had been initiated before the ombudsman, it had to be followed through to avoid the situation where the ombudsman demanded that the plaintiff pay a fine to abandon the case. Such a fine could be demanded in cases of *ran* and of wounding since book three, chapter 49, demanded that these cases be initiated before the ombudsman. We might expect that the same possibility would also be valid for more serious cases including murder. However, according to book two, chapters 50 and 51, the royal ombudsman did not have these powers in cases of murder: thus, he could demand that a fine was to be paid in cases of *ran* and wounding that were initiated but not followed through, but not in cases of killing. It is not very likely that the king's local ombudsman was to stay away from cases dealing with the most serious transgressions of law *while* he took on a role in less serious cases since it must be thought more important that justice was seen to be done with his help in proportion to the seriousness of the dispute. Therefore, the right to demand the payment of fines when cases were not carried through to their conclusion, which was granted to the ombudsman in chapter 49 of book three, must also implicitly mean that this right was

¹³⁶ Abel's draft statute from the beginning of the 1250s has the king as a party who provides and collects damages, but in no way does he have influence over whether a case is initiated, see DRL 1:7, § 13.

¹³⁷ See ESL II 50 and III 49.

also enjoyed by him in more serious cases such as in the initiation of murder cases, and thus we see a significant increase in the powers of the ombudsman compared to that found in books one and two.

The third example of the increased powers of the ombudsman at the end of the thirteenth century is more concerned with his executive function. This is seen when considering the problem of what to do in the case of an absentee defendant who has not attended any meetings of the court, then appears after a sentence has been passed because of his absence and promises either to prove his innocence through compurgation or to pay his fines, but then does not do so. In such a case it is clear from the procedural rules from chapters 50, 51 and 52 of book two that the culprit who had been sentenced automatically lost his peace—that is he was declared an outlaw. This meant, according to chapter 51, that the plaintiff could punish the culprit physically by either beating (without killing or wounding) him or by seizing a large enough part of the culprit's goods to cover the fine.

The legal term for this right is *nam*—the beneficiary of the sentence's right to unilaterally seize the culprit's movables when the beneficiary of the sentence's demands had not been met. This concept is found in all Danish provincial laws and thus it is clear that this particular legal institution was increasingly curtailed and regulated during the first part of the thirteenth century.¹³⁸ For us, the salient point is that chapter 52 stipulates that when a culprit refused to pay his fine, it was *the royal ombudsman* who was to seize the culprit's goods up to a value equivalent firstly to the fine awarded to the plaintiff and subsequently to the fine due to the king.¹³⁹ This was repeated more explicitly in chapters 51, 65 and 67 of book three where the last two mentioned chapters specifically say that the ombudsman "takes *nam* from the culprit". Here there is a clear contrast between the duty of the public official and the rights of a private individual, and the difference between the private and royal execution of law must be seen a significant expression of the transition from private to increasingly royal executive powers.

All in all, the rules of the latter part of book three give the impression that the office of the ombudsman had been functioning for a long

¹³⁸ See Gerhard Hafström, "Nam", *KLNM* XII, cols. 203–205, and Jens Ulf Jørgensen, "Nam, Danmark", *KLNM* XII, cols. 205–206.

¹³⁹ See also *ESL* II 28 and III 51.

time. In several chapters the main concern is to establish boundaries for the ombudsman's activity in particular cases, which shows that in specific cases it had become clear that the royal ombudsman did not always act correctly whether in regard to procedure or in regard to collecting royal fines.¹⁴⁰ There must therefore have been a number of specific cases in which royal ombudsmen did not observe or live up to the powers that they had. Valdemar's Law for Sjælland and the first two books of Eric's Law for Sjælland granted the ombudsmen comparatively few powers and it is clear that over time the ombudsmen committed a sufficient number of transgressions against their powers that it became necessary to react to their transgressions by adding rules curtailing their abuses of power in a collection of laws. This means that there must have been a significant increase in the ombudsman's powers in the period between The Book on Inheritance and Heinous Crimes and the earliest provincial laws (where he is often termed *bryde*), through the Law of Jylland (in which he is always referred to as ombudsman) to the composition of book three of Eric's Law for Sjælland.

Summary

The later provincial laws and the institutions that they provided for the administration of justice were mainly based on foundations that were laid down or were already in existence at the time of The Book on Inheritance and Heinous Crimes. We thus find fundamentally the same sentencing functions in the different provincial laws, which divide this function between the *herredsting* and the *landsting*. The *landsting* dealt with serious transgressions against the law, such as murder, malicious damage and refusal of the payment of fines—i.e. transgressions that might result in outlawry—while the *herredsting* dealt with less serious transgressions such as wounding, theft and the like. In some cases, however, it appears to have been possible to raise a case at either court, but it is not possible to speak of a first and second court of instance in which one could take an appeal from the first instance, the *herred*, to the second instance, the *landsting*. In the Danish provincial laws there was simply no appeal from one court to another since the two courts

¹⁴⁰ See ESL III 56, III 63 and III 65.

were there to ensure that a sentence was passed, thus if an agreement was not reached about what the law prescribed at the *herredsting* the case could be transferred to the *landsting*.

When, in Jylland, it was found that a sentence had been reached on the basis of perjury by jurors then the institution known as the bishop and best *bygdemænd* intervened. Such intervention was based on either a kind of appeal or an intervention by the best *bygdemænd* on their own initiative, which must have been based on knowledge of neighbourhood rumour.

Throughout this entire period the king played a minimal, albeit increasing, role in the administration of justice. According to the Law of Skåne, it was only possible for a case to be heard before the king if it concerned common local problems, but in the later provincial law codes such as book three of Eric's Law for Sjælland and the later redaction of Valdemar's Law for Sjælland, it became increasingly common for cases to be heard and transfers of property to be publicised before the king. In book two of Eric's Law for Sjælland it was also stipulated that the place and time for the *herredsting* was to be determined in consultations between the yhe men of the *herred* and the king.

In the same way, the executive functions are fundamentally alike in the early law codes, apart from the later and extensive inclusions of book three of Eric's Law for Sjælland. Thus we are mainly talking about a form of justice in which the winning party had to execute the decision of the court and, apart from book three of Eric's Law for Sjælland (where he was given the power to collect the fine after a sentence has been passed and the power to raise a case on his own) and one stipulation in the Law of Skåne where he was mentioned as the one who was to collect the king's share of a fine, the royal ombudsman was only mentioned in a few instances as the official who was to incarcerate a defendant if there was a perceived danger that the defendant would abscond.

While the tasks and competences of the ombudsmen did not change in the Law of Jylland, the institutions administering justice mentioned in this law are of an entirely different nature to the institutions that we encounter in other Danish provincial laws. The fundamental difference is that the juries that were appointed ad hoc at the *ting* for individual cases in The Book on Inheritance and Heinous Crimes and the early provincial laws were replaced in the Law of Jylland in many cases by permanent juries whose members were appointed either for their lifetimes by the king or elected annually by the men living in the *herred*.

My analysis of the powers of these juries has shown that in reality the juries mentioned by the Law of Jylland evaluated and if necessary investigated the facts of a case since their purpose was not just to decide a legal contest between two parties but also to establish the truth. The Law of Jylland expresses this more succinctly than any other medieval Danish collection of laws and this means, according to the Law of Jylland, that the juries must have had fundamentally inquisitorial powers to question parties, their witnesses and their compurgators. By introducing juries and following the lead of the Church, there was thus a break with the purely accusatorial procedure in which the parties produced evidence and legal contests were decided by the purely objective criterion of whether the defendant could produce the necessary purgation to reject an accusation. Jurors thus evaluated the evidence and depositions produced and subsequently pronounced their sentence; as we will see in the next chapter, this was a power they shared with the *ad hoc* juries of Eric's Law for Sjælland.

However, this did not mean that the sentence of the juries was necessarily executed. In the Law of Jylland we learn that juries' decisions could be rejected by a majority of the men of the *herred* if it did not agree with the consensus of the 'best and most'. This was the case regardless of whether the juries had pronounced their sentence unanimously or by majority. This privilege to reject a sentence that they found to be incorrect because of perjury or such like, enjoyed by the peasants and magnates of the local community, was further elaborated around the year 1300 by a stipulation that some jurors were to hear the same *herred's* men whether they were at all entitled to pass sentence, i.e. whether the procedure had been correctly followed and there was a consensus in society on the issue. This indicates that a sentence could not be enforced until the local community accepted it and with the local *ting's* informal role as the final authority in the decision of the law, the medieval administration of law as we find it in the Law of Jylland must be characterised as seeking consensus rather than simply churning out decisions.

This also means that the king did not have a particularly firm position of power locally in regard to sentencing or executive function. Valdemar II was thus not able to claim to be a royal plenipotentiary locally since he had to recognise the higher authority of the local *ting* in legal contests. By formally recognising this situation he did succeed in attaining a certain measure of influence on the development of legal administration in connection with his rights to appoint *sandemænd*

and in connection with the swearing in of jurors before royal ombudsmen, and thus both the king and the local community stood to gain by the institutional compromise that such stipulations of the Law of Jylland provide.

The Church also gained an advantage through this by introducing the principle of majority decisions that made secular administration of justice more effective and thus strengthened the effort against breaches of the peace in connection with the increased focus on possible perjury, which in these decades changed in canon law from being an interior subjective sin to a public crime that was to be met with a public punishment. In addition to this, at least in Jylland the bishop was granted the power to intervene in serious cases that were to be decided by the *sandemænd*.

Finally, all parties stood to gain by the fact that the permanent juries developed a certain experience in those specific cases on which they passed sentence because this accumulation of experience ensured a more fully considered decision than the previous purely mechanical methods of proof had provided.

Against this background the institutions for the administration of law in the Law of Jylland provided a level of higher learning than the previous provisions of Danish laws. However, the institutions and their powers needed to be adapted to prevailing relations of power in ways that meant that the principles of learned law were not always fully expressed. In the next chapter we investigate whether the same is true for the procedure found in Danish provincial laws.

CHAPTER SIX

LEGAL PROCEDURE IN THE PROVINCIAL LAWS

Just like the provincial laws and the institutions of legal administration, procedure underwent considerable development during the period when the provincial laws were written down. Several factors influenced and guided this development, but the three most important factors seem to have been: firstly, the royal central power's increasing control of and influence on social developments in general. Secondly, the Church's successful collaboration with the Danish royalty during the period known as the time of the Valdemars from 1157 to 1241. And thirdly, the training of people learned in law at universities, particularly in Bologna, and the subsequent dissemination of knowledge of Roman law and contemporary canon law to all parts of Europe, including Denmark.

Any study of the development of Danish procedure faces the same problems as those we identified in the previous chapter, namely that it is impossible to say anything for certain concerning how procedure was implemented before the first decades of the twelfth century, which is the date for *The Book on Inheritance and Heinous Crimes* and the provincial laws that give us the first written evidence. Also, that many procedures and legal rules are not analysed or even finalised until later collections of law. In addition, we can only take an individual collection of laws as evidence for how procedure was intended to be implemented in the specific jurisdiction from which it originated. This means that when mapping procedure in Danish medieval law collection it is necessary for the historian to move chronologically from one collection of laws to the next in order to gain an accurate picture of the many-faceted development.

The Book on Inheritance and Heinous Crimes

Information about the earliest Danish procedure is scanty and scattered and mainly originates in the last half of *The Book on Inheritance and Heinous Crimes*, which as mentioned above only dealt with situations that could not be resolved through fines. The reason why this

particular subset of crimes developed a fixed procedure must be that legal disputes involving violence and breaches of public peace must have demanded a more efficient control of decisions and sanctions than cases involving inheritance law.

The reason why procedure does not receive much attention in *The Book on Inheritance and Heinous Crimes* must be found primarily in the fact that it is only a small subsection of *The Book on Inheritance and Heinous Crimes* that contains ordinances that go beyond private law—just as we find in the later Valdemar's Law for Sjælland, which mainly repeats the provisions made by *The Book on Inheritance and Heinous Crimes*. In addition, *The Book on Inheritance and Heinous Crimes* provides a distinctly objective law concerning procedure and fines based on requirements that the defendant was to produce proofs, the nature of which were defined by the type of crime of which he had been accused—and if he could not produce this evidence he faced the prospect of a well-defined fine that was determined by the type of damage of which he had been accused and its extent. This means that we only find a few examples in *The Book on Inheritance and Heinous Crimes* in which there is a call for an evaluation of the extent of the damage and also that the law does not distinguish between accident and intention.¹ This is not surprising because the discussion of and challenge to the objective laws of penalties and sanctions, such as the ones we find in *The Book on Inheritance and Heinous Crimes*, had only recently been opened by new developments in canon law and secular local law had not yet been the subject of such consideration.

Procedurally speaking, *The Book on Inheritance and Heinous Crimes* (and Valdemar's Law for Sjælland) distinguished between two types of cases. On the one hand was private arbitration, which had to be concluded before a case was initiated; and on the other a formal case following criminal procedure, i.e. a procedure in which the parties individually pleaded their case and produced evidence without interference from an investigating official. Private arbitration could only be sought in connection with wounding, but it is also known from inheritance law in cases where disagreement had arisen between step-siblings and in which kin representing both sides were called

¹ See A & O IV 3 and IV 10, in addition to IV 2, ÆR 100–01 and YR 31–22, ÆR 70–71 and YR 15 in addition to ÆR 82 and YR 20.

to arbitrate between them.² If there was no agreement in a case of wounding, for example about the extent of the wound and whether the defendant was willing to pay for the damage, such a case could be heard by the *herredsting*, which appointed an ad hoc commission of four peasants to evaluate the wound. If the defendant did not accept their decision, the case was to be transferred to the *landsting* where the procedure involving four evaluators was repeated. Should the defendant refuse once more to acknowledge the extent of the wounding—which he admitted to causing—the royal ombudsman could force him to do so,³ that is the ombudsman could put his authority behind the evaluation and thus pressure the defendant to pay the amount that had been decided. It is interesting that at this time the ombudsman already had such an assignment when we consider the very few powers that he otherwise enjoyed in the public administration of justice, but it was probably a significant step forward to secure the execution of a decision that still rested with the local community by calling on royal authority.

If a case was initiated—which happened by its being announced at the *ting*—it had to be followed through to sentencing, otherwise the plaintiff became liable for a fine of three marks, to be paid to the king.⁴ The case could thus not be dropped without consequences. According to *The Book on Inheritance and Heinous Crimes* the only admissible excuse for abandoning a case was illness, which probably meant illness for either party. In Valdemar's Law for Sjælland another admissible excuse was added: travel abroad,⁵ which—together with royal service—was the most common admissible excuse in the medieval administration of justice.⁶

Once the case had been initiated at the *ting* the defendant could apparently be absent until the third subsequent meeting of the *ting* without serious consequences. If he did not appear at that fourth meeting of the *ting* to either deny—and thus become liable to produce evidence either by compurgation or trial by ordeal—or admit

² See A & O IV 10 in addition to I 70, I 71 and compare I 82 to ÆR 100–01 and YR 31–32.

³ A & O IV 10.

⁴ A & O III 21 in addition to ÆR 175 and YR 65.

⁵ See A & O I 49 to ÆR 47 and YR 5 in addition to ÆR 139 and YR 50.

⁶ See Paul Brand, "Delay in the English Common Law Courts (Twelfth to Fourteenth Centuries)", ed. C.H. van Rhee, *The Law's Delay. Essays on Undue Delay in Civil Litigation* (Mortsel, 2004), pp. 31–45, esp. 37.

the crime and thus become liable for the fine for his transgression, he would “without further delay” be pronounced an outlaw.⁷ Thus, the early Danish legal system had a shorter time limit for drawing a consequence of a defendant’s failing to respond than the one known from thirteenth century canon law, namely a year.⁸

Valdemar’s Law for Sjælland, possible inspired by the Law of Skåne, seems to have changed this procedure in cases concerning land because it stipulates that if the defendant did not appear before the court in such cases he was to pay a fine of two *øre* for each absence up to the third *ting*. At this final meeting a legally valid excuse had to be produced to prevent him automatically becoming liable for a fine. If such a legal excuse was sworn by two representatives the defendant would be granted the possibility to appear at the fourth meeting of the *ting* and to produce a fine or compurgation according to the law of Sjælland (“*syælæns faræ loĝh*”, which must refer either to Valdemar’s Law for Sjælland itself or—more likely—a kind of customary practice).⁹ On the other hand, if the defendant appeared at the first meeting of the *ting* subsequent to the initiation of the case he could pre-empt the plaintiff by producing the proof of compurgation. If this was the case he only needed to produce a certain number of compurgators, determined in proportion to the transgression, either three, six, twelve or thirty-six, who were to swear concerning the reputation of the defendant and not to the facts of the case.¹⁰ However, if the defendant did not immediately produce compurgation, and if the plaintiff then produced two witnesses to his claim, the defendant could only defend himself by carrying hot irons or, in the case of Valdemar’s Law for Sjælland, by subjecting himself to the decision of ad hoc appointed jurors.¹¹

It is not specified how the defendant was to offer compurgation before the plaintiff presented his proof, but the defendant may very well have been asked whether he was already able to produce such

⁷ A & O IV 27, see DGLN I, p. 243, and DGL VII, p. 113, in addition to ÆR 127–28 and YR 41, see DGLN I, p. 243, and DGL VIII, p. 60, p. 299.

⁸ See Brundage, *Medieval Canon Law*, pp. 129–130, who points out that this was a common consequence in thirteenth-century manuals of Roman-canonical procedure.

⁹ ÆR 213 (repeated in YR 84). Also see SkL 83.

¹⁰ See e.g. A & O IV 1, IV 19, IV 23, IV 24 or IV 25. In addition see ÆR 89 and YR 26, ÆR 114–18 and YR 35–36, ÆR 121–25 and YR 37–41. In A & O I 51 proof is provided by 12 ‘lovfaste mænd’—a status required of all compurgators. This kind of proof is replaced by juries in the rules found in ÆR 47 and YR 5.

¹¹ A & O IV 24 in addition to ÆR 123 and YR 39.

proof at the first *ting*. Regardless of this, according to Valdemar's Law for Sjælland, the proof by witnesses for the plaintiff was necessary in all cases if he wanted to demand a decision by jury. Otherwise the defendant could defend himself by compurgation in connection with the most serious crimes, usually three times twelve men.¹²

The rules of The Book on Inheritance and Heinous Crimes indicate that the law of inheritance had now become more attuned to the demands of proof required by the law of the Church because in its rules for inheritance law proof consisted mainly of twelve compurgators combined with the two witnesses required by canon law and it is also here that the *ting* witness (*thing witne*)—in which a well-defined number of men who had attended the *ting* and the legal proceedings swore to what they had seen and heard—is mentioned for the first time.¹³

As mentioned in Chapter 4 above, trial by carrying hot irons does not appear in Valdemar's Law for Sjælland since juries had replaced judgement by Divine intervention by that time. There is a singular instance in which we encounter a jury in a special form, namely in cases of wounding with so-called 'wound juries', which were to be initially composed of ten men, from whom the defendant could reject three, after which the case was to be determined by the majority of the remaining seven jurors.¹⁴ A comparable case can be seen in the so-called 'chapter on thieves', found in chapter 87 of the later editions of Valdemar's Law for Sjælland, in which the defendant was given the opportunity of rejecting three out of sixteen jurors and was finally exonerated if ten out of the remaining thirteen swore that he was innocent.¹⁵ In Valdemar's Law for Sjælland we thus see a kind of majority principle that is not known from earlier laws such as The Book on Inheritance and Heinous Crimes and the Law of Skåne. Since the principle of majority decisions was a new development of early thirteenth-century canon law, the appearance of this principle indi-

¹² See ÆR 143 and YR 52, ÆR 152–54 and YR 56–57, ÆR 160–61 and YR 59–60, ÆR 166 and YR 63, ÆR 169–74 and YR 65: in addition see ÆR 177–78 and YR 66. A & O III 4 required two witnesses, a demand that is not found in the comparable set of rules found in ÆR 152 and YR 56.

¹³ See A & O I 5, I 6, I 9, I 38, I 41, I 53, I 62, I 63, I 72 and I 75: also compare A & O I 11. On the requirement for two witnesses see Brundage, *Medieval Canon Law*, pp. 142–143. Two witnesses are also required by the Danish Church Laws in connection with bequests to the Church, see SJKI 8 and SkKI 5.

¹⁴ ÆR 123 and YR 39.

¹⁵ YR 87, see DGL VIII, p. 356. This was also found in the edition of the law of theft that was added to ÆR, see DGL VIII, p. 234.

cates an ecclesiastical or royal influence over the two types of decision, and in particular for the 'chapter on thieves'. Thus majority decisions were made in connection with theft in Valdemar II's Ordinance of Ordeal by Hot Iron, which may have been composed in 1222–1223. It is almost in the same place in Valdemar's Law for Sjælland that the possibility of perjury is mentioned, this time in accordance with the rules of the Law of Skåne.¹⁶

However, these probable first examples of the introduction of the principle of majority decisions in Danish procedure did not presage a complete change in the existing administration of justice because the other proofs by compurgation continued their existence unchanged. A solitary change does seem to have appeared in inheritance law, namely that Valdemar's Law for Sjælland insisted on adding two witnesses to twelve compurgators,¹⁷ possibly inspired by canon law in which two witnesses were necessary for full proof. Indeed, the introduction of two witnesses in the Danish administration of justice was most likely connected to the re-alignment of inheritance law that took place around 1170.¹⁸

It is the case in both The Book on Inheritance and Heinous Crimes and Valdemar's Law for Sjælland that if the defendant could not produce proof he had to pay the fine that was stipulated by law. If he refused to do this, he would automatically incur outlawry at a subsequent *landsting* and the king could seize his *hovedlod* but not his inherited lands.¹⁹ An outlaw might be able to pay a fine to win back

¹⁶ Compare ÆR 208 and YR 82 to SkL 78.

¹⁷ See ÆR 5–6 and YR 1, ÆR 9 and YR 1, ÆR 35 and YR 2, ÆR 37 and YR 2, ÆR 50–51 and YR 6–7, ÆR 59 and YR 12, ÆR 61 and YR 12, ÆR 72–73 and YR 16 in addition to ÆR76 and YR 18. A & O I 64 requires 12 compurgators, but ÆR 61 and YR 12 requires twelve compurgators and two witnesses.

¹⁸ Gelting, "Odelsrett—lovbydelse—bördsrätt—retrait lignager", p. 140; Gelting, "Pope Alexander III and Danish Law of Inheritance". The most recent study of this is Vogt, *The Function of Kinship in Medieval Nordic Legislation*, pp. 155–183.

¹⁹ The *hovedlod*—capital portion—functioned as a scale for distribution of the estate at the division of the inheritance or at donations. At death, the capital portion was estimated on the basis of the number of heirs, meaning that a son got a full portion whereas daughters got a half portion only. So, if there were three sons and no daughters, each got one-third of the inheritance, and if there were three sons and two daughters, the sons got one fourth each, and the daughters one eighth part, etc. If an heir wanted to donate part of the estate to others than the legal heirs, he would take part in the distribution of capital portions, as he had the right to dispose of a half capital portion. At the division of inheritance the distribution of capital portions could be performed in two ways: If it was inherited land, the inheritance would be distributed among the legal heirs, whether or not they were members of the same household community (in medieval Denmark called *fællig*) as the testator. If a member of the

his legal status but he could only do so if the injured party agreed.²⁰ Valdemar's Law for Sjælland outlines the procedural steps necessary for such a process and stipulates that the payment of the fine must take place with the ombudsman as an intermediary and that the former outlaw must go to the *landsting* and offer the injured party(ies) compensation that they must accept in order not to incur royal disapproval since they had already once accepted the offer of the payment of fines made by the outlaw just by joining the meeting.²¹ Thus it was ensured that the local community was informed that the parties had settled their disagreements and that the outlaw was once again an accepted member of the community through his payment of compensation. Thus the *ting* functioned not as the place where an agreement was reached but the place in which an agreement was published and its terms were proclaimed.

The accusatory procedure found in The Book on Inheritance and Heinous Crimes and mostly repeated in Valdemar's Law for Sjælland provides evidence that procedure had not yet reached an especially advanced level. It was a decidedly fixed procedure in which the production of evidence was purely 'negative', i.e. that the defendant had to prove his innocence rather than the plaintiff having to prove the guilt of the defendant. If the defendant could not purge himself of an accusation he was thus automatically subject to sentences and sanctions that, like the methods of proof, were fixed so that there was no evaluation of the facts of the case or of the evidence produced and the defendant was assumed guilty until proven innocent.

The reason why it was necessary to have procedure of this kind is probably because there were no institutions that could guarantee an unbiased evaluation of the claims and proofs produced in court. It was therefore necessary to have a purely formal procedure that had clearly defined demands for proof in order to claim that the case had been decided objectively and impartially. The case may have been initiated

household community died, his movable estate and potential purchased land was to be distributed within the household community, which meant that external heirs would not have a share in it. Movable estates and purchased land might also be inherited according to the ordinary inheritance rules, if the testator was not a member of such a household community. See Vogt, *The Function of Kinship in Medieval Nordic Legislation*, pp. 157–159, and basically Stig Iuul, *Fællig og Hovedlod. Studier over Formueforholdet mellem Ægtefæller i Tiden før Christian V's Danske Lov* (Copenhagen, 1940).

²⁰ A & O III 1 in addition to ÆR 144–49 and YR 53–54.

²¹ ÆR 139 and YR 50.

and proven at the *herreds-* and *landsting* but since it was undoubtedly the people who had the most resources who were able to enforce their will in this forum the solution was not to have these men sit as a sentencing tribunal if the intention was to secure a certain degree of equality before the law where all parties were judged according to the same rules. The solution was to have a purely formalistic procedure where everyone, regardless of social standing, was to produce the same proof. It was only in this way that a certain degree of equal treatment for all parties could be maintained. The consequence of this was that it had no meaning to have fixed proof—if a person had been robbed during the night while he and all other members of his household or neighbourhood were asleep it was impossible to produce unquestionable proof concerning who had perpetrated the crime and therefore a formalistic system could only function when it investigated the trustworthiness of the defendant and not the facts of the case. It was this—that proof as such was not the subject of the case, but rather the parties and their trustworthiness—that in the thirteenth century made the Church characterise proof such as compurgation as ‘negative proof’; it did not say anything positive about the case or about culpability, i.e. it did not prove anything concerning the facts of the case.

The second characteristic of early procedural law is the comparatively insignificant fine imposed on a person who abandoned a case and the defendant’s ability to ignore three summons to court. The legal system was not yet developed enough that it included the possibility to rein in such actions that prolonged cases; such developments came later. In comparison, there are a few chapters in the older edition of Valdemar’s Law for Sjælland and in the later added law of theft in which we find the newly developed principle of majority decision seen in canon law. This suggests a softening of the law of proof based on objective proof, which hitherto had been found in these laws, and the development of a procedure that encouraged evaluation.

The Ordinance on Manslaughter 1200 AD

On the anniversary of the Massacre of the Innocents²² King Canute VI published a statute concerning killing in Skåne in the presence of many

²² Matt. 2:16–18.

nobles from that area: *multis nobilibus eiusdem terre*. According to the king he did this because the people living in Skåne were more subject to the crime of killing than any other inhabitants of his kingdom and also because the perpetrators forced those whom they considered to be their kin—even though they may not have been—to contribute to their fines. In order to stamp out this abuse the punishment for killing was increased in this province and this was laid out in nine chapters, which clearly and individually enumerated the punishments for killing and wounding to be imposed on both the killer and those who accompanied him when the crime was committed.²³ These rules must have been more severe than existing law although they did not necessarily reject the foundations laid by The Book on Inheritance and Heinous Crimes and local custom.

The topics that were covered by the statute were, firstly, regulation of the responsibility of kin so that the killer himself was to pay a third of the *mandebod*, that is the fine for killing a person (§ 1).²⁴ Secondly, that kin were only to contribute to fines in connection with killing and not for other transgressions against the law, and that the killer was not to pay the contribution of a kinsman who refused to pay—in such cases other kinsmen and then the king were responsible for raising that money (§§ 2–3). Thirdly, it was stipulated that if the victim's relatives performed a revenge killing on the killer after receiving compensation these kinsfolk were to be perpetually outlawed (§ 9). If someone had been accused of killing, a fourth stipulation was that the method of proof to dismiss the accusation had to be the carrying of red-hot iron if the plaintiff could produce two witnesses to the killing while, if there were no witnesses, the defendant could prove his innocence with either 12, 24 or 36 compurgators whose number was determined in proportion to the severity of the accusation (§§ 4–5 and §§ 7–8). Fifthly, the fine for killing or malicious damage was forty marks, which was to be paid to both the injured party and the king, while it was

²³ DD 1:4:24.

²⁴ Fenger, *Fejde and Mandebod*, pp. 363–364, sees this as a limitation of the responsibility of the kin-group which he argues must have been prevalent before the Church formulated its doctrine of individual responsibility. Vogt argues against Fenger's interpretation in *The Function of Kinship in Medieval Nordic Legislation*, pp. 133–138, in which she sees the rules to be a refinement of previous rules limiting responsibility for financial compensation for killings. However, both Fenger and Vogt see these rules as intended to minimise the circumstances under which the King's peace was broken as a consequence of non-payment of fines.

usually the case that two times three marks sufficed for the man who merely accompanied the killer without being involved in the killing itself (§§ 4–7).

Several of these rules are clearly more severe compared to the sanctions of The Book on Heinous Crimes concerning the same transgressions. Primarily, it is clear that when revenge was taken after the payment of a fine, The Book on Heinous Crimes stipulated more severe fines than for ordinary killings while the Ordinance on Manslaughter proposed perpetual outlawry.²⁵ Secondly, the Ordinance on Manslaughter extended the sanctuary of a house to include its fields or where the landowner had laid down his spear and his shield, i.e. where he could be correctly seen to have laid down his arms and therefore to be protected. In The Book on Heinous Crimes this ‘space’ only extended as far as the farm and its buildings.²⁶ According to the The Book on Heinous Crimes the crime of malicious damage required a minimum of five people each carrying three so-called ‘popular arms’—that is sword, spear and helmet—while the Ordinance on Manslaughter changed this to be more severe with just one weapon per man.²⁷ Finally, the Ordinance was more severe in its handling of cases of perforation wounds—i.e. wounds where skulls had been broken or stomachs or chests had been perforated—because in such cases the perpetrator had to prove his innocence with two times 12 compurgators if there were no witnesses, while the The Book on Heinous Crimes stipulated that twelve compurgators sufficed. At the same time, the person found guilty of wounding also had to pay a fine to the king, which was not the case in The Book on Heinous Crimes.²⁸

The Ordinance on Manslaughter also called for a more difficult proof compared to The Book on Heinous Crimes in its § 8. In all cases of wounding, two witnesses had to testify to the culpability of the defendant before he could be required to carry hot irons. A demand of this kind is not found in The Book on Heinous Crimes in cases of wounding.²⁹ The Book on Heinous Crimes thus seems to demand less proof from the plaintiff in cases of wounding than was the case in

²⁵ A & O III 2, but see DD 1:4:24, § 9.

²⁶ DD 1:4:24, § 6, but see A & O III 4–9.

²⁷ A & O III 4, but see DD 1:4:24, § 7.

²⁸ DD 1:4:24, § 8, but see A & O IV 18–19.

²⁹ Concerning adultery, see A & O II 1, 2 and 4; concerning malicious damage, see A & O III 4 and 5; concerning apprehension, see A & O III 10 and 11; concerning killing and assault, see A & O III 16; concerning *ran*, see A & O III 18, 19 and 21.

the Ordinance on Manslaughter of 28 December, 1200. The explanation for the less stringent demands for witnesses in cases of wounding must undoubtedly be found in the fact that the wounds in themselves were seen as proof of damage done³⁰ and a basic assumption was that victims only accused those who were responsible for the injuries they had suffered. The change in the Ordinance on Manslaughter, calling for more witnesses, thus indicates that the courts accepted that even obviously innocent people could be accused of wounding or that the courts were more attentive to the production of positive proof and the law concerning such proof in cases of wounding. However, neither in these nor in other connections was it a requirement that witnesses must have witnessed the injurious actions and the introduction and use of witnesses in medieval Danish legal practice was thus first and foremost an increased demand on the plaintiff to ensure that he was not the kind to maliciously or otherwise bring a false accusation. He was now to be vouchsafed for by two good men, in the same way that compurgators vouched for the defendant. It is only in the later provincial laws that we begin to see a movement towards a more substantial proof since jurors were then charged with the task of finding the truth in a case.

As mentioned before, it is not clear whether The Book on Inheritance and Heinous Crimes was a collection of laws for the entire kingdom or just for part of it, but *if* the The Book on Heinous Crimes was a part of law implemented in Skåne until this time, there was a serious intent behind King Canute VI's reference to the fact that violence in Skåne now needed to be curtailed by an increased severity in the administration of justice. Compared to the collection found in The Book on Heinous Crimes, the rules of the Ordinance on Manslaughter clearly express a tightening of the law that was evolutionary rather than revolutionary compared to the existing administration of justice. Thus the last part of the Ordinance on Manslaughter—apparently only concerning § 9, which stipulates that a convicted killer who committed a revenge killing after receiving a fine from his victim was subject to irreversible outlawry—points out that

³⁰ A & O IV 24 is the only chapter in which witnesses are mentioned in connection with accusation. In this case their use is limited to cases where the victim does not show his wounds to the *ting*.

although it is within the power of the king to give or change laws *we do not give new law because law was fixed in olden times* but we call it to mind again from whence it had disappeared, made obscure by the mists of ignorance because of the passing of time, which is the mother of forgetting.³¹

The rest of the Ordinance on Manslaughter's increased severity thus also seems to have been the result of negotiations between the king and Archbishop Absalon of Lund (r. 1177–1201), the king's *gældker* (*ciuitatis prefecto*) in the city and many magnates of Skåne.³²

According to the previously mentioned Ælnoth, around 1120, the law was based on the *landsting*'s decisions.³³ However, in the later part of the century new rules of inheritance and a fixed administration of justice in connection with serious or violent breaches of the law could probably be decided by the individual provinces, for example as they were established in The Book on Inheritance and Heinous Crimes. The negotiations surrounding the Ordinance on Manslaughter bear witness to the fact that new legal rules still required the acceptance of the *landsting* or at least of the magnates. There was thus no unified set of laws for the whole realm, and for this reason there is nothing suspicious in the fact that the king and the inhabitants of Skåne together increased the severity of the administration of justice in the eastern province of the realm. There is thus nothing surprising in the fact that the medieval Danish legal order was a pluralistic system with different geographically limited legal boundaries, or that there were different collections of laws in individual provinces. Regardless of whether the acceptance of the *landsting* meant that The Book on Inheritance and Heinous Crimes became the valid law for all inhabitants of the realm, rather than an exception to the already existing state of law in the provinces, it was more likely in relation to the state of law based on provinces rather than a forerunner for the principle that legislation should be given for the entire realm. The state of law was and remained based on the provinces, not on the realm, even though the king, the Church and some of the magnates probably strove to create

³¹ See DD 1:4:24, § 9: "Quamuis autem regi sit potestatis leges condere uel mutare. *Legem hanc ex nouo non condimus. sed ab antiquis temporibus constitutam.* et annorum multitudine. que obliuionis mater est. ignorancie nebulis obfuscata. ad humanam a qua laps<a> est memoriam reuocamus." (my italics).

³² See DD 1:4:24, note 5.

³³ VSD ch. 23, pp. 111–112.

a uniform law on the level of the realm. This is demonstrated by the later provincial laws.

The Procedure in the Law of Skåne

Procedure in The Law of Skåne shares with The Book on Inheritance and Heinous Crimes the fact that it does not present a unified whole, but must be pieced together with the help of the rules that govern substantive law. In actual fact this means that procedure is found scattered throughout the entire collection because, following the paraphrase's stated rule that there is a difference in every case between the person who causes damage and the one who suffers damage and the means and the ways in which damage is caused,³⁴ there are many possible ways and means, using fixed proof and fines in every conceivable situation or damage, that damage has been done or that the accused is innocent. It is probably best to say that the procedural law and the law of sanctions contained in the Law of Skåne was based on a kind of fixed 'principle of proportional equivalence' according to which the degree of damage, as determined by the court, occasioned a demand for a predetermined degree of proof and a subsequent fixed degree of sanction. The 'principle of proportional equivalence' did not mean that there was a direct proportion between damage and compensation in the same style as 'an eye for an eye and a tooth for a tooth', but that there was a predetermined fine to be imposed for specific damages. As was the case in The Book on Inheritance and Heinous Crimes, the Law of Skåne did not enjoy the possibility of evaluating the extent of a particular damage or the concrete proof since the method of proof was to a large extent fixed by the accusation and sanctions were also fixed; as we have previously seen, the slightly later Valdemar's Law for Sjælland shared these principles.

Procedure

Like The Book on Inheritance and Heinous Crimes, the Law of Skåne and the slightly later Valdemar's Law for Sjælland allowed a case with strict adherence to accusatory procedure—in which a private party summoned another private party, who subsequently had to defend himself

³⁴ See the mention of this in ASun 64.

without further action from the plaintiff or a public power³⁵—to be heard by two *ting*. The first *ting* heard the summons and provided the forum for making the accusation known to the accused and his duty to appear at a subsequent *ting*. How the defendant was to be informed about the accusation if he was not present at the *ting* we do not know, but according to the Church Law of Skåne, the publication of the case should be followed by an oral summons that was to be delivered in the presence of at least two kinsfolk of the defendant.³⁶

When the publication had taken place the defendant could only excuse his absence by illness, pilgrimage or if he was engaged in a search for runaway cattle.³⁷ Under these circumstances it was perhaps possible for the defendant to be represented by someone else and thus not appear before the court in person, in any case it was only in these cases that the law allowed for a postponement of the time at which the defendant had to appear.³⁸ If the defendant did not appear or had not provided for representation at the second meeting of the *ting* to which he had been summoned, he was to pay a fine, and if he again failed to attend the third meeting the case was normally lost and he would automatically be subject to the sanction or punishment prescribed for the transgression in question.³⁹

The defendant could thus not draw out the case without paying a fine, but if he could prove that it had not been legally published and that he therefore had not been legally summoned he could have the case re-convened as if nothing had happened. However, should he argue that he had not been correctly summoned, he would need to prove that the plaintiff did not have witnesses who could vouch for the publication having proceeded according to the rules and then prove his innocence, as was demanded by the rules related to the transgression under dispute. In some cases, the proof for a claim that the summons had not been correctly performed consisted of the oaths of twelve local

³⁵ A purely investigative function is only mentioned in the instance when a *fled-føring* complains about the treatment they receive, see SkL 44.

³⁶ SkKl 11 (text 1).

³⁷ SkL 83 and 146.

³⁸ This possibility is mentioned in in SkL 66 and 146. See ASun 91.

³⁹ Examples of this are found in SkL 14, 42, 73, 83, 231 and 241. See also ASun 7. This seems awfully like the rules for excommunication or non appearance at church courts, see Brundage, *Medieval Canon Law*, pp. 129–130.

landowners, the so-called *odelsbønder*. In other and more serious cases the trial by hot irons had to be undertaken by the accused.⁴⁰

In the case of the Law of Skåne, this meant that the defaulter could be ordered to carry hot irons twice in the same case—first to have the case reconvened and secondly to prove his innocence. Considering the, after all, high success rate of defendants in cases demanding the carrying of hot irons in other European sources,⁴¹ the automatically convicted person seems to have had a good chance of dragging out his case by not appearing before the court and then successfully submitting to the carrying of hot irons to have the case reconvened. In reality though, the accusation must have been very serious for the defendant to make the conscious decision to avoid prosecution in such a manner with the uncertainties and inconveniences that the carrying of hot irons must have entailed. When the later redaction of the Law of Skåne abandoned the carrying of hot irons as proof this possibility was replaced by the decision of ad hoc appointed juries, which ideally must have taken account of an evaluation of the defendant's/the automatically sentenced person's claim.⁴²

If it was the plaintiff who was absent without valid reason, Anders Sunesen's Paraphrase of the Law of Skåne stipulated that in the cases where the defendant could not produce counter-proof the plaintiff could only receive the disputed goods and no additional fines.⁴³ That the plaintiff in some cases did not appear at the *ting* is not mentioned by the Law of Skåne itself, and whether the archbishop's remarks about such cases reflect actual law or consequences that he wished to apply on the basis of canon law is not possible to discern.

The rule that the defendant had to appear at the second meeting of the *ting* following the summons was not consistently carried through. In chapter 121 of the Law of Skåne concerning killing by an unknown culprit we learn that the heirs of the deceased must enquire three times at the *landsting* to find the killer, subsequent to which they must summon any suspect over two *ting* to appear at the third *ting*. The reason why the summons in such cases had to be over two *ting* is explained in

⁴⁰ See for example SkL 14 and 121 in addition to 145.

⁴¹ See van Caenegem, "Methods of Proof", p. 76, and Kerr, Forsyth and Plyley, *Cold Water and Hot Iron*, in addition to White, "Proposing the Ordeal and Avoiding It".

⁴² See DGL I.1, p. 88 and p. 112, in addition to textual variant in DGL I.1 compare also SkL 66, 86, 88, 89, 146, 177, 180, 217, 218, 223, 226 and 230.

⁴³ ASun 89.

neither the Law of Skåne or by Anders Sunesen. In the Church Law of Skåne and in the the Law of Skåne it is clear that the summons usually only lasted until the next meeting of the *ting*, after which a fine became due.⁴⁴ This longer term granted to the alleged killer can thus be understood as an extra amount of time for him to either decide whether to admit to the killing or prepare his counter-proof. The first possibility rested on a moral consideration while the second was more pragmatic, but if the exception to the norm is to make sense the extended term for the unnamed killer must be understood as an expression of a wish to identify the killer so that the case could be determined in the correct manner.

The only exception to the rules of one *ting* between the initiation of the case and a summons and one *ting* for the production of proof was if the plaintiff had caught a thief red-handed and produced him at the first *ting*. In such cases the thief was to be taken into custody by the ombudsman until the case had been decided. In other words, such cases did not call for a formal summons.⁴⁵

If a charge was made against a thief at a meeting of the *ting*, but this charge was not followed through at a subsequent meeting, the plaintiff had to pay a fine to the accused and to the king.⁴⁶ But such a false charge did not have any further consequences. This is in contrast to the learned law, according to which it was common that the 'accuser' who made accusations against his better knowledge without following these accusations through, should pay the same fine as the 'accused' would have paid if the case had been followed through and a decision had been made against him.⁴⁷

If both parties appeared at the second *ting* when the case had been published, the next step was to decide which proof was required and who should produce it. To be allowed to produce proof seems in several cases to have been a positive right,⁴⁸ possibly because a person could thus actively prove his allegation or innocence.

⁴⁴ SkL 121 and ASun 57 in addition to SkKl 11 (text 1).

⁴⁵ See SkL 85, 136, 138, 139, 145, 162 and 184. On the other hand, the ombudsman was not responsible for the appearance of the defendant as was the case in England, see Brand, "Delay in the English Common Law Courts", p. 33.

⁴⁶ SkL 158.

⁴⁷ See for example Cod. 9.2.17 and Cod. 9.46.10 in addition to C. 2 q. 3 c. 2 and C. 2 q. 8 c. 4.

⁴⁸ See for example SkL 49 and 55 in addition to ASun 88.

From the outset, the defendant had two possibilities when he appeared before the *ting*. He could declare his guilt and pay a fine to the plaintiff, or he could deny the charge and thus risk losing the case and pay a higher fine to the plaintiff and to the king (or the archbishop).

If the defendant claimed to be not guilty and the case progressed, the law of proof found in the Law of Skåne shows this collection's casuistic nature since the law presupposed fixed proof in concrete cases, which was fixed without any particular systematic principles being discernable.⁴⁹ While the plaintiff, as a rule, had to substantiate his accusation with the help of two witnesses, as is known from canon law (where it was equalized with one witness and supplementary evidence), the counter-proof usually consisted of compurgation, compurgation in combination with a couple of witnesses, or trial by ordeal. Compurgation was produced by a defined number of compurgators who—under oath that they would swear before God in accordance with their conviction—were to swear concerning the trustworthiness of the party, not on the subject matter of the case itself. If these compurgators, chosen by the defendant, refused to swear, they had to pay a fine to the king.⁵⁰ In a few cases, compurgators were supplemented by a couple of witnesses, while the carrying of hot iron was only used as proof in particularly serious cases or when the trial had reached the point where the case could not be decided against the background of human knowledge (about the character of the defendant) and had to be left to God.

If the standing of the parties was not clear—for example in the case of inheritance to be divided between half-siblings—a fixed jury consisting of the parties' kin or the parish or *herred*'s men convened to reach an acceptable division, in contrast to the ordinary witness or compurgation proofs.⁵¹ Such juries seem to have functioned like brokers of conflict resolution rather than the agents of a legally correct solution (which probably was not possible anyway because of the often-missing irresistible proofs for the distribution of wealth between the deceased parents).

⁴⁹ See SkL 67, 68, 69, 127, 131, 132, 140 and 197.

⁵⁰ SkL 149 in addition to 67, 69 and 72.

⁵¹ See SkL 27, 28, 70, 72, 80 and 231.

Usually, a pure proof by witness was demanded in those cases where the plaintiff was required to prove his claim, but if the defendant could not produce the necessary witnesses he could purge himself with the help of the fixed number of compurgators. If the plaintiff did not produce his proof by witnesses and the defendant still denied the charge, the defendant was required to produce proof that was more difficult, for example a larger number of compurgators or the carrying of hot irons (juries—which probably were charged with evaluating the trustworthiness of the parties—later substituted the latter).⁵² If the defendant was thus convicted, he had to pay a large fine, both to the plaintiff and the king (or the archbishop) and if he refused to pay these large sums of money he would automatically be outlawed.

The means of proof and the demands of proof in the Law of Skåne and in the other provincial laws must be characterised as graduated in relation to the circumstances of the case, the exceptions that could be made, and procedural niceties that were outlined by individual chapters. Within the same chapter we thus see, on the one hand two witnesses, and on the other hand compurgators—whose number could vary from three (including the defendant),⁵³ to six, 12 and 24 and even 36⁵⁴—producing full proof, while in other cases these means of proof had to be combined together.⁵⁵

In general, the laws do not specify who compurgators may be, but in some cases they are required to be those who have a special interest in or a special knowledge of the dispute, such as for example land-owning peasants (*odelbønder*) in cases concerning property, 'lawfast' men in cases concerning movables, *sognemænd* in cases of obstructions to the way to church, or old men in cases concerning ancient boundaries.⁵⁶

⁵² See for example SkL 218. The difference between which edition is used, whether it calls for trial for hot iron or a jury, is particularly clear in this instance. Compare the dubious interpretations of this chapter in Åke Holmbäck and Elias Wessén, *Svenska Landskapslagar IV: Skånelagen och Gotalagen* (Stockholm, 1943), pp. LVII–LVIII.

⁵³ These cases are few, see SkL 72 and 108 in addition to ASun 5, 37 and 110.

⁵⁴ See for example SkL 144, 175 or 187.

⁵⁵ While two witnesses or an agreed number of compurgators appear commonly in SkL, the combination of two witnesses and 12 compurgators is only found in SkL 2, 4, 37, 44, 50, 127, 131, 132, 142, 150, 162, 197, 230, 232 and 241. ASun 24 adds another instance that is not found in SkL and ASun 16 mentions proof consisting of 12 compurgators in addition to proof of court action—which according to SkL 18 and 233 should be made up of at least two people, which is characterised as a full proof in ASun 17, 18 and 40.

⁵⁶ See SkL 10, 13, 14, 19, 29, 31, 47, 51, 53, 55, 56, 72, 75, 80, 82 and 83 for proper-tied freemen and 'lovfaste mænd', and SkL 70 and 72 for 'sognemænd' and elders.

Apart from these cases, there does not seem to have been any kind of systematic approach to which cases demanded which proof.

There is one place in which the common means of proof are not used. In chapter 147 the plaintiff is granted the power to nominate twelve jurors from the *herred* to determine a case of theft. Among the twelve chosen, the defendant is granted the power to reject three, after which three new jurors are nominated, but if this proof fails the defendant must carry hot irons. This combination of an independent jury—whose oath, according to Anders Sunesen, is solemn, for which reason the plaintiff must accept their verdict if it goes against him⁵⁷—and the carrying of hot irons is not found in other chapters in either redaction of the Law of Skåne. This thus seems to be a step in the direction of independent juries in cases that dealt with one of the more serious crimes, so that the law thus tried to move away from negative proof where it was only up to the defendant to disprove the accusation—of which the carrying of hot iron and for that matter compurgators were a part.

If a counter-proof failed, the case was lost. The sentence was thus a ‘sentence by proof’ (*Beweisurteil* as it is called by German legal historians), i.e. that the sentence followed automatically on the achievement or non-achievement of the proof. In general, sanctions consisted of a fine, to be paid solely either to the plaintiff, the king or the archbishop.⁵⁸ In many cases, however, it was paid to the plaintiff and the king, but in proportions laid down by the law.⁵⁹ When the defendant had paid his fines he was to produce an oath that he himself would have accepted the fines for the transgression for which he was now paying a fine. This indicates that it was not considered to be as honourable to receive such fines as it would have been to revenge the wrong committed.⁶⁰ In return, those who received a fine in cases of killing had to produce a ‘safety oath’, that is an oath in which they promised not to take revenge for the killing.⁶¹

⁵⁷ ASun 92.

⁵⁸ See SkL 102, SkL 67, 69, 70 and 72 in addition to SkL 67, 70 and 172.

⁵⁹ See for example SkL 73, 86, 88, 89 and 91.

⁶⁰ Holmbäck and Wessén, *Svenska Landskapslagar IV*, p. LXIII, see SkL 113 and 114. See also Helmuth Schledermann, *Gensidig tålsomhed. Islam and Vesten—juridisk politisk* (Højbjerg, 2007), pp. 108–109, concerning this.

⁶¹ SkL 85 and 97.

Sanctions and their Preventative Purpose

Apart from outlawry, which the sentenced person brought on himself by not producing a fine, the Law of Skåne mentions corporal punishment in connection with theft, and the form of this punishment was in proportion to the value of the stolen goods. If the value was half a mark or more, the thief could be sentenced to hanging on the evidence of two witnesses, but if it was less he became subject to whipping, the loss of body parts or being drawn and quartered. In contrast to the latter the Law of Jylland, in which the ombudsman was to execute a hanging for theft of a value of more than half a mark,⁶² according to the Law of Skåne the men attending the *ting* could do whatever they wanted to do to the thief. It is probable that in reality a variety of other punishments were allowable, and this is presumably the reason why Anders Sunesen in his paraphrase lists several more corporal punishments for theft than we find in the Danish text itself. Indeed, Anders Sunesen explains that these punishments had a preventative purpose so that potential thieves were dissuaded by fear.⁶³

The preventative effect was supported by the fact that there was no appeal if a counter-proof failed and thus, ipso facto, a sentence of guilty was passed. The lack of access to appeal is not surprising in itself since such a possibility was not a firmly established part of contemporary ecclesiastical procedure. However, as mentioned above, according to the Law of Skåne the defendant did in fact have one possibility for avoiding punishment, namely by insisting that correct procedure had not been followed at the *herredsting* and that for that reason he had not performed the punishment he had been given. In such cases he had the possibility of producing proof by hot irons at the *landsting*, which could then subsequently re-examine the case.⁶⁴ Potentially, the defendant thus had the possibility to drag out the case by, in the first instance, not attending the first and second *ting* after the accusation had been made, after which he could count on receiving his sentence, and then claiming he had not been summoned correctly. If he could prove this, using recognised reasons for absence, the case had to be newly initiated. Then he had new possibilities for non-attendance, and

⁶² See JL II 87.

⁶³ See SkL 85, 130, 151, 162 and 184 in addition to ASun 95. For the necessity of two witnesses to a hanging, see SkL 162 and ASun 85.

⁶⁴ See SkL 139 and 145.

when the plaintiff finally sought the remedy of the *landsting* to gain more authority for his case and the subsequent sentence, the defendant had the possibility of proving his innocence by hot irons.

At the same time as the law of procedure in the Law of Skåne, taken to its extreme, provided a possibility to drag out the case unnecessarily, it also provided the possibility that a case could progress through the system very quickly through its demands for fixed proof and automatic sanctions and its insistence on the principle of objective guilt. If the defendant appeared at the second *ting*, he needed to present the proof of his claimed innocence demanded by the specific case. If he did not, he would automatically be subject to the sanction prescribed in this specific type of case, with no weighing of evidence or regard to intentionality or guilt. If he did not submit to the prescribed sentence and sanction, he would be declared an outlaw and thus lose his legal rights. If this happened, he could only reclaim his rights if he successfully carried hot irons as proof that procedure or summons had not been correct, at which point the case would then be re-opened. While we know from The Book on Inheritance and Heinous Crimes, the Law of Jylland and the provincial law codes for Sjælland that the outlaw had the possibility to buy back his peace and legal rights from the king and the other party, this possibility does not appear to have been available in the Law of Skåne and this is undoubtedly because such a possibility had been specifically prohibited for Skåne in cases of killing in the Ordinance on Manslaughter from 1200.⁶⁵

The purpose of the payment of a fine for a legal transgression must have been an attempt to both limit violent revenge, which seems to have preceded the administration of justice and the system of fines that was established at the latest by the provincial laws, and re-establish the social equilibrium that had been disturbed by this transgression against the law.⁶⁶ Thus the underlying principle of punishment in the Law of Skåne's administration of justice is conjoined with the idea of equivalence. Since Egyptian times this has been symbolised by the picture of two scales in balance, which today is a familiar illustration of justice.⁶⁷ In a word, we are dealing with re-establishing balance or

⁶⁵ DD 1:4:24, § 9.

⁶⁶ See Fenger, *Fejde and Mandebod*, pp. 405–410, 413–415.

⁶⁷ Erik Anners, *Den europeiske rettens historie* (Oslo, 1998), p. 24. For a short outline of the development of the principle of equivalence and its close associate of proportionality in criminal law, see Per Andersen, "En historie om nogle almindelige

equality between the involved parties, and in the Law of Skåne this principle found its form in the fact that one had to compensate for damage to the extent of the lost 'profit' or 'income' that was one of the consequences of losing, for example, a member of the family or a body part. It was thus solely a case of compensating for consequential damage and therefore in general there was no distinction between whether the damage had happened because of accident, lack of attention or evil intent.

A nascent tendency towards evaluating factors such as intent and accident is to be found in some chapters. It is stipulated that, while a fine must be paid under all circumstances to those who suffered damage through the direct or indirect actions of the culprit or his animals, in those cases where such damage was unintentional, i.e. it was caused by accident or a lack of attention, a fine was not payable to the king or the archbishop.⁶⁸ Thus the culprit needed to correct the damage, but not pay a supplementary fine for it, i.e. he was not subject to punishment. This must be taken to mean that the king and the archbishop renounced their right to fines in cases of accident, although they tried to prevent the abuse of such a renunciation by preserving the right of their ombudsmen to prosecute a case when the official found that damage had not happened accidentally.

The theory behind such a division into compensation and punishment can be found in contemporary canon law—if we interpret the compensation to the damaged party as the penance that should reconcile the culprit with God and the fine to the king or archbishop as the preventative punishment, the Law of Skåne is fully aligned with the law of sanctions as expressed in the *Liber Extra* from 1234.⁶⁹ In terms of legal procedure, the Law of Skåne bears witness to the fact that it originated at a time when Roman-canonical procedure was only at the beginning of a development that, in many ways, was to characterise the rest of the Middle Ages, with its possibilities for inquisitorial procedure, permanent juries and judges, speedy process and written production of evidence. These aspects of procedure are not to be found in the Law of Skåne, which was fundamentally based around a comparatively autonomous procedure in which a case might take place at

retsprincipper", eds. Jørgen Dalberg-Larsen and Bettina Lemann Kristensen, *Om retsprincipper* (Copenhagen, 2004), pp. 147–79.

⁶⁸ See SkL 101, 102 and 108.

⁶⁹ See Kéry, "Aspekte des kirchlichen Strafrechts", pp. 293–294.

the local *ting*, but in which the parties in reality simply produced fixed proof and where the unsuccessful production of such proof automatically lead to an already fixed sanction or punishment.

Thus neither in the Law of Skåne itself nor in the rules of procedure it applied does there appear to have been more permanent institutions for the administration of justice that secured a correctly conducted and, if possible, more comprehensive procedure. We may find the beginnings of some canonically influenced norms in a few places, but these were either not so developed that they could make themselves necessary to the legally knowledgeable people of Skåne, or it may not have been possible for the king and the Church to secure their use over the local legal order that already existed or had been negotiated in connection with the writing down of the Law of Skåne. In the main, the administration of justice in the Law of Skåne seems to have been of local origin, even after the introduction of juries instead of proof by hot irons.

That the Skåne collection of law was very close to the break-through of the learned law is clear from one of the additions to the law, which was published during the relatively short period between its composition and Anders Sunesen's paraphrase. Several of the additions that were produced were either incorporated into the paraphrase or added to the collection, but one of these in particular was so important that it was mentioned in the paraphrase. This was the Ordinance on the Kin's Collective Payment of *Wergeld* (*Ættebodsforordningen*). The Ordinance on the Kin's Collective Payment of *Wergeld* is in direct disagreement with the principles of The Law of Skåne's chapters 85 and 92, which stated that kinsfolk had to pay a fine together with the culprit. The statute thus aimed to establish personal culpability, a principle that was strongly advocated by the Church in these years.⁷⁰

The Ordinance on the Kin's Collective Payment of *Wergeld*'s system of personal compensation may have been difficult to implement in practice since the culprit may, in many cases, not have been able to pay

⁷⁰ See appendix II of SkL and ASun 45. Concerning this, see Virpi Mäkinen, & Heikki Pihljamäki, "The Individualization of Crime in Medieval Canon Law", *Journal of the History of Ideas* 65 (2005), pp. 525–542, and Knut Wolfgang Nörr, "Prozesszweck und Prozesstypus: der kirchliche Prozess des Mittelalters im Spannungsfeld zwischen objektiver Ordnung und subjektiven Interessen", ed. Knut Wolfgang Nörr, *Iudicium est actus trium personarum. Beiträge zur Geschichte des Zivilprozessrechts in Europa* (Tübingen, 1993), pp. 183–209. For another interpretation, see Fenger, *Fejde and Mandebod*, p. 373.

the compensation that he was supposed to. In cases where the culprit absconded, the Ordinance on the Kin's Collective Payment of *Wergeld* demanded that kinsfolk should still pay their part of the compensation to the victim's kin, who might otherwise have the right to take revenge on the culprit's family. Thus the culprit's kin were fundamentally obliged to participate in the payment of compensation and in one of the later additions, which seems to have been composed before the Church Law of Skåne in the 1250s and added to the manuscripts containing The Law of Skåne, the personal responsibility insisted upon by the Ordinance on the Kin's Collective Payment of *Wergeld* is largely ignored.⁷¹ Instead, the Ordinance on the Kin's Collective Payment of *Wergeld*'s insistence on the obligation of the culprit's kin in cases where the culprit absconded provided precedence for the rest of the kingdom of Denmark from the end of the thirteenth century.⁷² This obligation of the culprit's kin was probably Church *realpolitik* when it was realised that it was difficult in many cases to make the culprit pay compensation on his own.

Valdemar's Law for Sjælland—Following the Tradition

Procedure in Valdemar's Law for Sjælland was already analysed in our discussion of The Book on Inheritance and Heinous Crimes, but in this connection—before we consider the supplement to the law of Sjælland, Eric's Law for Sjælland—it will be useful to briefly summarise the analysis.⁷³

The law of procedure in Valdemar's Law for Sjælland was, like the law of procedure in the other early provincial laws, remarkably accusatory in character. One private party summoned another private party and was personally responsible for carrying out the sentence that might be the outcome. The law of proof was mainly negative, i.e. that it was the accused that had to disprove the accusation rather than the accuser who had to prove it. The only exception to this (when we disregard the cases where the plaintiff had to have two witnesses to prove his case) was found in the law of inheritance, according to which—if the defendant

⁷¹ See appendix IV 3.

⁷² See the more detailed treatment in Vogt, *The Function of Kinship in Medieval Nordic Legislation*, pp. 135–137.

⁷³ For notes, see under A&O. See DD 1:5:96, § 2.

was accused of having acquired his inheritance wrongly—he had to disprove the accusation with two witnesses and twelve compurgators. In such cases, the two witnesses gave evidence that the inheritance had been divided correctly and thus positively supported the defendant's position. If the required counter-proofs, which were fixed relative to the transgression alleged in the case, were produced, the defendant was automatically free while he was automatically liable to sentence if unsuccessful. Only in connection with the law of inheritance do we find the possibility of a private settlement by arbitration before the case was heard by the *ting*. According to The Book on Inheritance and Heinous Crimes this was also a possibility in connection with cases of wounding, but in Valdemar's Law for Sjælland we find a specialised jury of woundings that evaluated the wounds disputed in the case and decided the question of guilt. These juries are not discussed in detail, and therefore we must assume that they were appointed ad hoc amongst those men who had appeared on a particular day at the *ting*. This is also the impression we get from the comparable rules in Valdemar II's Ordinance of Ordeal by Hot Iron, which must have been composed before Valdemar's Law for Sjælland.⁷⁴

Valdemar's Law for Sjælland, like The Book on Inheritance and Heinous Crimes, saw the beginning of a case as the publication of a transgression against the law by the plaintiff at a meeting of the *ting*. When this had been done, he was obliged to see the case through to its end. If he did not, he was subject to a fine. Valdemar's Law for Sjælland allowed very few exceptions to this for either the plaintiff or the defendant. At a subsequent meeting of the *ting* the defendant could promise to produce counter-proof against the plaintiff before the plaintiff proved his accusation with the help of two witnesses. This was the rule in those cases where the transgression was so serious that the defendant was subject to outlawry. When the defendant thus preempted the plaintiff, he could disprove the accusation through compurgators, the number of whom rose according to the seriousness of the crime, while the case was to be determined by unbiased jurors if the plaintiff produced his evidence before the defendant had managed to assemble his counter-proof. This construction of procedure thus encouraged the defendant to appear at the first meeting of the *ting* to defend himself since if he did this he then had the right to proof

⁷⁴ See DD 1:5:96, § 2.

and was allowed to produce a less demanding proof than in the cases where the plaintiff produced his proof first.

The reason for the existence of this possibility for the defendant must be found in the opposite rule that the defendant could wait to appear at the third meeting of the *ting* after the publication of the case. Until then there were no sanctions for his non-appearance, making it possible for him to delay the case. If he did not appear at the third meeting of the *ting*, the defendant was automatically subject to outlawry but, in contrast to the situation in Skåne, he could appear at a *ting* in Sjælland in order to buy back his peace. Only in those cases where the case concerned landed property would the defendant encounter a demand for a fine of two *øre* every time he stayed away from the *ting*. This was a tightening of the rules found in The Book on Inheritance and Heinous Crimes, which did not have such a fine, and when we consider that most cases in one way or another probably dealt with landed property—they certainly did so at a later date—this sanction was clearly part of an attempt to make the administration of justice more efficient.

In terms of proof, juries, as mentioned above, were replaced by hot irons when deciding cases concerning the most serious transgressions against the law. The selection of these juries is not detailed in Valdemar's Law for Sjælland, nor their function clearly stated, but they were probably selected ad hoc at the *ting* and charged with the case. Their decision was to be based on the two witnesses produced by the plaintiff for the juries, in reality totally replaced the carrying of irons, which were the defendant's counter-proof according to The Book on Inheritance and Heinous Crimes. This may indicate that these juries were introduced to function as objective compurgators appointed by the *ting*, which possibly would have been a tightening of the demands of the trustworthiness of the plaintiff, but probably not as difficult to produce as proof by hot irons: this is the impression given by Valdemar II's Ordinance of Ordeal by Hot Iron.⁷⁵

Overall, there were some developments that increased the demands of the proofs that were to be produced and evaluated, and it gave the defendant good reasons not to drag out the case. But this was not a revolutionary change that totally changed the administration of Danish

⁷⁵ See DD 1:5:96, § 1.

justice. It was the tradition to which the rules of procedure found in Eric's Law for Sjælland later added.

Towards a New Law of Procedure—Eric's Law for Sjælland

In the main, the law of procedure in Eric's Law for Sjælland was close to the accusatory form that is characteristic of The Book on Inheritance and Heinous Crimes, The Law of Skåne and Valdemar's Law for Sjælland, with their insistence on personal suits⁷⁶ and the production of proof by the parties involved. However, as we shall see in those cases where a decision was reached by jurors, there was a clear change in the perception of what their role might be for the jurors in these cases had the right to inquire into and discuss the details of the case.

Next to the formal law of procedure, Eric's Law for Sjælland imitates Valdemar's Law for Sjælland in its provision of the possibility of arbitration through financial compensation without involving the *ting* and the king. This was a possibility in two cases. Firstly in cases of adultery, where the cuckolded husband determined the size of the financial compensation that he was to be paid by his wife's sexual partner, and secondly in connection with buildings that had been wrongly placed on public ground, in which the transgressor was given the possibility of moving his building before a case was formally instigated.⁷⁷ Eric's Law for Sjælland thus provided a formal and more extensive possibility of access to arbitration before it turned into a formal case to be conducted at the *ting*. It is however quite likely that this was simply a reflection of the way in which many people already managed such problems so that the rules that we find in Eric's Law for Sjælland were simply a formal statement of already current avenues of arbitration: If a person was willing to tear down a building they had erected on public land without much protest, there was not really a good reason to conduct a formal case at the *ting*. A similar case could be found when a man acknowledged his sexual transgression and the injured husband could accept such an acknowledgement by gaining compensation for the action that had affected his honour.

As a consequence, Eric's Law for Sjælland was more concerned with developing and refining procedure found in Valdemar's Law for

⁷⁶ This is emphasised in connection with homicide in ESL III 30.

⁷⁷ See ESL II 2; II 53 and II 70.

Sjælland in cases that were formally initiated at the *ting*. The rules of procedure are found mainly in three chapters of Eric's Law for Sjælland, namely chapters 50, 51 and 52 of book two. These three chapters are the most informative found in all the provincial laws concerning procedural law since, in contrast to all other Danish collections, they gather together information about procedure in one place in a few comprehensive chapters.⁷⁸

Publishing and Summoning—Two Types of Procedure

According to Eric's Law for Sjælland there were fundamentally two different procedures that might be followed in cases of serious transgressions against the law that might end in outlawry, i.e. felonies. Either the injured party could summon a named person to appear before the *ting* or the injured party could appear at the *ting* and publicise the transgression, mentioning the name of the person who he held responsible. The choice of procedure determined the further treatment of the case, and the two procedures, individually and together, reveal the unique character of the administration of justice in Sjælland.

The traditional way of initiating a case, that is the way that we also find in The Book on Inheritance and Heinous Crimes, The Law of Skåne and Valdemar's Law for Sjælland, was to publish it at the *ting*. To publish meant that the plaintiff publicly declared whom he sought as responsible for a transgression. If the defendant did not appear at the next *ting* the plaintiff again published the case and this could—as a speciality for Eric's Law for Sjælland—happen five times. At the fifth *ting* the absentee defendant would automatically be declared outlawed because of his lack of appearance and defence. The starting-point for the Danish administration of justice was thus that a case could not progress until both parties were present, but that there had to be a limit on the number of absences allowed for the defendant, which was set at the fourth or the fifth *ting*, while England, for example, saw the king develop a number of procedures in the last half of the thirteenth century that allowed the case to be settled quickly in the absence of the defendant.⁷⁹

⁷⁸ Where nothing else is specified, these three chapters form the basis for this analysis.

⁷⁹ Brand, "Delay in the English Common Law Courts", pp. 32, 35–36.

The point of the publication of a case was that the defendant had to defend himself at any time, even when the plaintiff did not pursue the case in the correct manner, that is, if the case had been published just once the defendant could no longer counter-sue before he had proved his innocence in the previously published case. To publicise the case—to declare the accusation in a public forum—thus meant that the defendant could be called upon at any meeting to produce a counter-proof. Thus, the demand for full publicity was fully followed through in the administration of justice on Sjælland.

In contrast to this way of initiating a case, Eric's Law for Sjælland introduced a second method where the first step was not as public. To summon to the *ting* simply meant to determine a place and a time where a meeting took place to decide a legal dispute and when the plaintiff summoned the defendant he would not inform the defendant of the nature of the accusation that would be made. A summons, according to Eric's Law for Sjælland, seems to have imitated Roman procedure:⁸⁰ Two men from the local community were charged by the plaintiff to seek out the defendant one or two days before the meeting of the *ting*, depending on whether the defendant was summoned to the local *herredsting* or to the provincial *landsting* in Ringsted. By the oral presentation of the summons, the summoners were to make certain that the defendant was assisted by two kinsmen, who could testify that the summons had taken place correctly (as had already been stipulated by the Church Law of Sjælland in 1170). Thus the case was initiated in the *ting* that followed immediately after a summons, that is significantly faster than by the repeated publication, and if the defendant was absent from this or one of the following *ting* without a proper excuse he was to pay only a small fine in compensation. However, this could only go on until the third meeting of the *ting*, at which the defendant or his representative either had to carry hot irons or convince the men attending the *ting* to allow him to wait until the fourth meeting of the *ting* to produce his counter-proof. If the defendant was successful in this, and still remained absent at the subsequent meeting of the *ting*, he was automatically outlawed.

For the plaintiff, the advantages of the summons were: that the process started more quickly; that the process could, at worse, last for four

⁸⁰ See Max Kaser, *Das römische Zivilprozessrecht*, 2nd ed. (München, 1996), pp. 566–576.

meetings of the *ting* (compared to the publication procedure's five *ting*);⁸¹ and that the plaintiff was entitled to economic compensation if the defendant did not appear at the meetings of the *ting* to which he had been summoned. However, this kind of procedure also had its disadvantages: when summoning, the plaintiff had to appear with two witnesses to prove that the defendant was guilty, and the defendant had the right to counter-sue the original plaintiff if a summons had not been correctly executed by him. That is, the original defendant could sue the original plaintiff if the latter did not follow through his plea but, for example, was absent from one of the meetings of the *ting* dealing with the case.

If the plaintiff had the necessary witnesses and if he was certain that he could appear at any later meeting of the *ting*, the procedure involving summonses was thus preferable because he could get a faster decision in the case and because he had the possibility of forcing the defendant to admit his guilt since the jurors (in theory) were to give greater credence to the proof of witnesses than to the compurgation given by the defendant. On the other hand, if the plaintiff did not have the necessary witnesses he had to use the procedure involving publication in which such witnesses were not necessary but where the defendant had a good possibility of defending himself by compurgation.

The fact that the accusation in the procedure involving summonses was only published when the plaintiff appeared at the *ting* producing witnesses to the fact that he had summoned the defendant to appear meant that the defendant had the possibility to settle the matter before it appeared before the *ting*. If he had a weak case there was probably no reason to risk a fine for non-appearance. The procedure by publication did not provide such an opportunity. Thus there was a real possibility that even comparatively serious breaches of the law could be settled before they were even raised publicly, for which reason the formal extension of the permitted areas for arbitration did not just cover the two instances mentioned above.

⁸¹ In connection with the procedure of summoning it is stated "that it is not legal that the defendant keep the plaintiff waiting beyond the fourth court session", see DGLN II, p. 50, and DGL V, p. 148.

The Proofs

A defendant's absence from home at the start of the procedure for a case had to be proven by compurgators and the law provided fixed terms for when he had to appear before the court. However, if the defendant was present in the *herred* or in the province and if he and the plaintiff both appeared at the meeting of the *ting*, a decision would be quickly made.⁸²

As has become clear, one of the fundamental proofs in the Danish collections of law consisted of a graduated number of compurgators, depending on the seriousness of the alleged transgression. In many cases, the case was solely decided by such a negative counter-proof. The use of compurgators, who in some cases are also called *bygdemænd* or *herredsmænd*, or were to be chosen from the defendant's kin,⁸³ was thus in Eric's Law for Sjælland in harmony with the law of procedure that is known from other Danish provincial laws.⁸⁴

In contrast to this were the positive proofs, which included proofs concerning the case itself rather than about the trustworthiness of one of the parties, and which in themselves provided such weight that they, like a true confession, could determine the outcome of the case on their own. These positive proofs were, firstly, the *ting*'s witness,⁸⁵ i.e. witnesses to the fact that an agreement had been produced publicly at the *ting* so that the local community knew about it,⁸⁶ and secondly, in the full proof that was made up of two witnesses to the facts of the matter.⁸⁷ Both these kinds of proof were commonly the proof that the plaintiff had to produce in order to gain his rights, and this kind of law of positive proof was therefore an expression of a development influenced by canon law since the canonists, based on their extensive study of the Roman law, argued that a defendant ought to be considered

⁸² See mainly the same procedural rules in ESL II 6, II 10, II 12, II 13, II 14, II 19, II 20, II 23, II 26, II 42, II 46, II 47 and II 51.

⁸³ See ESL I 23 and I 24 in addition to I 2 and I 34.

⁸⁴ For the varying numbers of compurgators, see ESL I 9, I 19–20, I 33–37, I 39, I 49 and II 2, II 10, II 13–14, II 19–20, II 32, II 39, II 42 in addition to II 45–47. The only exception to this is the rule that under no circumstances could a son disprove his father's claim, see ESL I 25.

⁸⁵ ESL I 9, I 32 and II 17.

⁸⁶ See esp. ESL II 10, but also I 11, I 19, I 25, I 38 and I 39.

⁸⁷ For these, see for example ESL II 1, II 2, II 19, II 20, II 23, but esp. II 26.

innocent until the opposite was proven, i.e. that the party who produced an accusation had to produce evidence of it.⁸⁸

While the two first positive proofs thus speak for themselves we will tarry a little at the jury, which seems to have been charged with evaluating the proofs produced and thereafter with pronouncing their sentence. In comparison to Valdemar's Law for Sjælland, this finds a more succinct expression in Eric's Law for Sjælland, which also explains how the jurors were to be selected. According to Eric's Law for Sjælland the right to appoint jurors rested with the plaintiff, who was to appoint sixteen land-owning men⁸⁹ in the *herred* in which the defendant lived. Subsequently, the defendant had the right or duty to reject three of these.⁹⁰ The remaining thirteen jurors⁹¹ must then discuss and evaluate the proofs produced, whereupon a decision would be made for the party whom the majority of jurors supported. The proof of oaths in such jury cases was "less than the jury". That is, the proof by oath could be set aside by the decision of the jury, and thus the proof by oath in cases that were published at the *ting* was only part of the proof produced by the defendant.⁹² In contrast to Valdemar's Law for Sjælland the jurors were active and decided the case after each of the parties individually had produced their proof. The jurors, in themselves, were not proof.

It is not stated explicitly, but it appears that in serious disputes that were to be decided by juries certain inquisitorial elements were introduced into the procedure so that the jury could discuss and ask probing questions and trump every item of proof produced by their decision. Eric's Law for Sjælland thus testifies to how the former practice, where the decision was solely dependent on whether the defendant could produce counter-proof, was left behind. This kind of *Beweisurteil* was consigned to the past in the province of Sjælland by Eric's Law for Sjælland.

A development of this kind is really not surprising because we find similar developments in contemporary England where locally appointed jurors pronounced sentence according to what they knew

⁸⁸ See Fraher, "Ut nullus describatur", based on Dig. 22.3.2.

⁸⁹ See ESL II 26.

⁹⁰ ESL II 68 mentions a jury consisting of thirteen jurors without the mention of such a 'udskydelse'.

⁹¹ ESL I 32 is the only place in that text where the number of jurors can be 12.

⁹² See for example ESL I 32 and II 40.

about the involved parties and the facts of the case and what they found by, for example, interrogating witnesses.⁹³ It thus seems to have been the introduction of inquisitorial procedure and its attendant professionalization and establishment of courts with judges and jurors who served for a long time, that lead to an increased use of advocates in England. With the abandonment of the objective *Beweisurteile*, the rhetorical element—the process of convincing the judge or the jury that one’s interpretation of the case was the correct one—now determined the outcome of the case.⁹⁴ The contours of a similar development are also discernible in the administration of justice on Sjælland in the text of Eric’s Law for Sjælland.

As a curiosity, there are two chapters in Eric’s Law for Sjælland that use proof by hot iron. Their existence has previously been taken to indicate a certain degree of passive written culture in which scribes, paying little attention, merely copied down laws from existing texts, but the explanation may also be found in the nature of existing procedural law. As we have already seen above in connection with The Law of Skåne and Valdemar’s Law for Sjælland, Danish medieval procedural law could be slow, with its publication after publication after publication of the case that allowed the defendant time and time again to excuse his non-appearance at the *ting* and thus postpone the decision of the case. In this slow and ponderous process, the defendant’s last possibility to excuse his non-appearance was that he could claim that he had not been summoned correctly to the many *ting* happening between the initiation of the case and the one at which he finally appeared. If he was able to prove his claim he could “make the case anew”, that is that the case was now to be initiated again following correct procedure and thus the defendant could avoid the many consequences that his absence would have previously incurred.⁹⁵ According to Valdemar’s Law for Sjælland, the defendant’s proof for his permissible absence or absence of summons appears to have consisted of twelve compurgators and two witnesses.⁹⁶ In The Law of Skåne, which

⁹³ Daniel Klerman, “Was the jury ever self informing?” eds. Maureen Mulholland and Brian Pullan, *Judicial Tribunals in England and Europe, 1200–1700. The Trial in History I* (Manchester and New York, 2003), pp. 58–80.

⁹⁴ Paul Brand, *The Origins of the English Legal Profession* (Oxford, 1992), pp. 14–49.

⁹⁵ See SkL 83 and ASun 41 in addition to ÆR 213 and YR 84 as above.

⁹⁶ ÆR 213 and YR 84 do not mention this explicitly. Instead they refer to *logh at fæstæ*, which usually refers to proof by oath.

seems to incorporate an older layer of the law, this proof consisted of carrying hot irons.⁹⁷

The same seems to have been the case in the Sjøælland area, if we are to believe that there was some reality behind the two chapters in Eric's Law for Sjøælland that mention the carrying of hot irons. In these, the defendant was given the possibility of postponing the hearing of a case by offering to carry hot iron. In chapter 51 it is explicitly stated that

if the defendant appears at the first *ting*, it is more right that he either offers proof by oath [if he denies his guilt] or fines [if he acknowledges his culpability]. If on the other hand, he wants the *ting* to be postponed [i.e. extending the process and the terms] he must offer to carry hot iron.⁹⁸

The carrying of hot iron had been abandoned by the time Eric's Law for Sjøælland was composed, but a party could apparently still claim that his case was so strong that he was willing to carry hot iron (if hot iron had still been permitted). In contrast to The Law of Skåne, this offer to carry hot iron was probably a slightly anachronistic formality at this time, but the point was clear: by doing so, the defendant challenged the *ting* to let him carry hot iron, which the *ting* of course had to reject and therefore had to permit the postponement that had been requested. The possibility to do so remained until the third meeting of the *ting* if the defendant had not appeared before then.⁹⁹

The difference between The Law of Skåne and Valdemar's Law for Sjøælland on the one hand and Eric's Law for Sjøælland on the other concerning these matters is that The Law of Skåne and Valdemar's Law for Sjøælland made the case 'anew', i.e. that the proof for permissible absence in the final analysis meant that the case had to be re-initiated as if it were a new case—this was not the case in Eric's Law for Sjøælland. Eric's Law for Sjøælland recognised the claim of an absence of summons and the defendant's rhetorical pressure for the *ting*'s recognition of this only gave him the possibility of extending the time period for the case. If the defendant could not appear before the *ting*, according to the rules of Eric's Law for Sjøælland he could not ignore the summons in order to avoid the case, but he was forced to

⁹⁷ See SkL 139 and 145.

⁹⁸ ESL II 51 according to DGLN II, p. 54, see DGL V, pp. 160–161. The same is seen in ESL II 50, See DGL V, p. 147.

⁹⁹ See the same chapters, DGL V, p. 147 and p. 161. Thank you to Michael H. Gelting for fruitful discussions on this subject.

intervene in the case and claim more time by legal means in order to compose a defence or return home in cases where he was absent from the province.

This gives evidence of a new attention to the fact that legal terms had to be met, and there is no comparable case in the other Danish provincial laws where the defendant could object to the summons, as he could according to Roman-canonical procedure, and thus extend the case itself.¹⁰⁰ The possibility of doing so in Eric's Law for Sjælland therefore expresses an increased insight into procedural law, which corresponds very poorly to the mention of proof by hot iron. Therefore, the mention of proof by hot iron does not testify to the fact that these chapters in their entirety reflect an older and abandoned law of proof at the time of the composition of Eric's Law for Sjælland. A possible explanation of this discrepancy could be that, if the defendant wanted to postpone the *ting's* treatment of the case he simply had to put so much rhetorical weight behind his claim of missing summons, the *ting* had to grant him more time to prepare his defence. To extend the legal terms and therefore the case was not an easy matter, and the extraordinary mention of the carrying of hot iron may have been the best means to avoid the dragging out of a case by the defendant because the knowledge that he wished to extend the legal terms was thus expressed in the strongest possible way. Therefore, the proof that had been abandoned in 1215 was kept (or re-introduced?) in the administration of Danish justice, not to be used but to provide a pre-emptive strike against those who would do nothing and were trying to avoid legal consequences.

When I thus oppose the traditional Danish view that the chapters on carrying hot iron—chapters 50 and 51 in book two of Eric's Law for Sjælland—are interpolations that reflect an older state of the law without having an actual function in Eric's Law for Sjælland it is also because of the context of the two chapters. With chapters 48 and 49, which provide for where and when *ting* are to be held and how many

¹⁰⁰ See Kaser, *Das römische Zivilprozessrecht*, pp. 566–632, which treats post-Classical Roman procedural law as it is found in *Corpus Iuris Civilis*, especially pp. 582–589, which refers to Cod. 4.19.19, Cod. 8.35.12–13 and Dig. 44.1.2.4. The same reservations are found in C. 3 q. 6 c. 2, C. 3 q. 3 c. 4.7. It was one thing to legislate but an entirely different thing to establish sanctions against delays, which meant that there was a steady stream of legislation concerning this, see R.H. Helmholz, "Undue Delay in the English Ecclesiastical Courts (circa 1350–1600)", ed. C.H. van Rhee, *The Law's Delay. Essays on Undue Delay in Civil Litigation* (Mortsel, 2004), pp. 131–139.

people need to be present before it is a quorate *ting*, and chapter 52, which deals with the sentence of outlawry, these two chapters constituted a part of the law that was intended to determine the rules for the *ting* as an institution of legal administration with sentencing functions and to refine the procedural rules that had not been sufficiently treated in the proceeding chapters on sentences found in chapters 1 to 47 of book two. The two chapters are reflections on the content and the failures of the previous chapters and thus reflect the fact that the authors who composed these chapters were well acquainted with the law as it stood. Thus this part of Eric's Law for Sjælland does not appear to have been written down by privately motivated, untrained persons—on the contrary.

Punishment and Sanction

As was the case in other Danish provincial laws, punishment and sanctions were fixed in Eric's Law for Sjælland and if the defendant could not defend himself, or if the jury's sentence favoured the plaintiff, the culprit had to provide financial compensation and pay the fine that the law stipulated. In other words, it was a question of compensating those who had suffered damage because of the transgression, i.e. the plaintiff, through the payment of a fixed amount, the size of which was determined by the extent of the damage.¹⁰¹ Like the other provincial laws, Eric's Law for Sjælland provided an objective compensation so that the defendant, if he could not disprove his guilt with compurgators or persuade the jurors, was to pay a fine regardless of whether the damage had been caused by accident, recklessness or on purpose.¹⁰²

In the first two books of Eric's Law for Sjælland it was thus not the case that the sanction was to be estimated on the basis of culpability, i.e. from the subjective state of the culprit or his possibility to foresee the damage and thus prevent it.¹⁰³ This simple picture was modified slightly in book three, firstly in the case where someone borrowed or took weapons away from the plaintiff without permission. In this case

¹⁰¹ A good example of this can be found in the comprehensive rules to be found in ESL concerning wounds, see ESL I 33–45. If the plaintiff was attacked he could demand that the jurors were to inspect the wounds in order to establish the appropriate compensation, see ESL II 40.

¹⁰² See ESL II 58–67 and II 73.

¹⁰³ Concerning the development of this in the High Middle Ages, see Kuttner, *Kanonistische Schuldlehre*.

it was enough to pay half the damage because if someone could take weapons away, the weapons had not been properly guarded and it was the duty of everyone to look after their weapons and to monitor their use.¹⁰⁴ Secondly, Eric's Law for Sjøælland emphasised that a mentally ill person should not be allowed to dispose of his property or land, i.e. that a deal relating to real-estate with a mentally ill person did not meet the criteria for a legal transaction.¹⁰⁵ Thirdly, the king and the bishop desisted from their right to fines in those cases where the person causing the damage was believed to have caused the damage unintentionally, i.e. that it was caused by an accident or without intention.¹⁰⁶

The size of the fines imposed by Eric's Law for Sjøælland were by and large the same as in previous collections of law, and if the defendant paid the fine before or after the sentence he suffered no further legal sanction apart from the fact that the plaintiff, just as in The Law of Skåne, was to acknowledge the payment by swearing an oath that the defendant would henceforth be safe, i.e. that he accepted the fine and he would not seek revenge on the culprit or the culprit's kin.¹⁰⁷

In contrast to the other Danish law books, it is also clear from Eric's Law for Sjøælland what was to happen when the defendant was incapable of paying the fine despite the fact that he was willing to do so—if he was not willing to do so he would automatically have been declared an outlaw. In the first case, where the *herredsting* had passed a sentence that carried a large fine, the *ting* appointed four men who *either*, with the friends and relatives of the culprit, were to enquire into whether the culprit would promise to pay the fine later, *or* were to evaluate if it was possible for the culprit to pay at all, *or* if he was to be permitted to pay a smaller fine. If their evaluation was negative, that is that the culprit could not or would not pay the fine, the *ting* was to appoint another group of men who were to accompany the plaintiff to the *landsting* where they were to bear witness to the fact that justice had not been done. In that case the culprit would be outlawed, but with the possibility that he could appear before the next *landsting* and

¹⁰⁴ ESL III 13–15.

¹⁰⁵ See ESL III 36, which emphasises that the mad man must have a guardian. The idea that mad men were not culpable for their actions because they, like children, were not aware of the consequences of their actions, was developed by decretists that followed Gratian. See Kuttner, *Kanonistische Schuldlehre*, pp. 85–110, 124–132.

¹⁰⁶ See ESL III 15 i DGLN II, p. 89, and DGL V, p. 261.

¹⁰⁷ ESL II 38.

declare his willingness to pay the fines and purchase back his peace. If he did not meet these demands he would lose his peace for ever.¹⁰⁸

In the second case, outlawry was already declared at the *herredsting* as a consequence of the fact that the defendant had not appeared at a single meeting of the *ting*. In this case too he could purchase his peace, but if he did not do so before the case was initiated at the *landsting* he was outlawed for ever without the possibility of repurchasing his peace, which was a clear tightening of previous practice in Sjælland. If the case was not produced before the *landsting*, he only lost his peace in the *herred*, i.e. whether the outlawry was declared at the *herreds-* or the *landsting* determined its geographical extent.¹⁰⁹

Outlawry was a risk in all cases that were determined by juries, i.e. cases of malicious damage, killing, wounding and breaches of the peace of the Church, i.e. felonies. Common to these cases was the fact that the king and the injured party or their kin could mutually give each other permission to purchase peace (the king) and to receive delayed fines (the injured party) when a sentence of outlawry had been passed.¹¹⁰ Only in connection with arson that resulted in the loss of life were physical punishments such as burning at the stake or being broken on a wheel explicitly mentioned. However, in such cases the law provided for the culprit to have the possibility to hide after the sentence was pronounced because otherwise no one would expose themselves to a defence through compurgation.¹¹¹ In this Eric's Law for Sjælland clearly recognised that proof by oath was uncertain in relation to the law of procedure, which was to be the foundation of the administration of justice, i.e. compurgation in itself was not enough to secure a person's freedom.

Fundamentally, the law of procedure in the first two books of Eric's Law for Sjælland was very similar to that found in Valdemar's Law for Sjælland with its private plea, production of proof and private execution of the sentence, but in a number of instances Eric's Law for Sjælland either changed or clarified an earlier change in the law more explicitly than had been the case in previous provincial law codes.

¹⁰⁸ ESL II 51–52.

¹⁰⁹ ESL II 50–52.

¹¹⁰ See ESL II 3–9 in addition to II 22.

¹¹¹ ESL II 15. When a sentence from a *herred*'s court was not carried out, the winning party could strike the culprit or he could choose to be compensated against the culprit's will, see ESL II 50–52.

This is *firstly* the case with regard to the ad hoc juries that were authorised by Eric's Law for Sjælland (probably using inquisitorial procedure) to investigate a case by questioning the parties and their witnesses whereupon the jurors evaluated the facts of the case and pronounced a sentence intended to conclude the case.

Secondly two procedures are outlined, one based on the older publication of a case in which the plaintiff appeared before the *ting* and there publicly announced the case and the name of the defendant, the other based on a probably more recent manner of initiating cases that began when the plaintiff handed the defendant a summons to appear before the *ting* where the case was to proceed according to specified rules. The differences between the two procedures were: *that* the procedure of summons could not extend over as many meetings of the *ting* as was the case with the procedure of publication, *that* the defendant in the summons procedure was supposed to pay a fine if he did not appear (which was not a requirement in the publication procedure), and *that* the defendant in the summons procedure had the right to initiate a case against the original plaintiff if the original plaintiff did not follow up the case correctly. Such a possibility was not available in the publication procedure where it was stipulated that the person who was a defendant in a case was always required to produce a defence before he could counter-sue.

Thirdly Eric's Law for Sjælland proposed the same fundamental sanctions and punishments as previous provincial laws, i.e. an objective compensation and a fixed monetary compensation. However, the final part of Eric's Law for Sjælland indicates a movement towards an increased differentiation between involuntary and intentional, between intention and recklessness, i.e. the beginnings of the use of the idea of culpa, which the canonists in previous decades had developed based on Roman law.

Against this background the law of procedure in Eric's Law for Sjælland does contain individual traits reminiscent of the ones we know from contemporary Roman-canon law, although they are traits that were suited to the existing administration of justice in the jurisdiction of Sjælland.

Innovative Procedural Law—The Law of Jylland

The investigation of the institution for the administration of justice performed in the previous chapter introduced some of the issues that are fundamentally part of the law of procedure and especially found in the Law of Jylland. These are the question of appeal and the form of procedure (pure accusatory or accusatory with elements of inquisition). But the investigation of the institutions of the administration of justice did not focus on, and therefore did not exhaustively analyse, the law of procedure, neither in the earlier laws nor in the Law of Jylland. Similar to the earlier laws the Law of Jylland did not have a systematic presentation of the rules of procedure. The rules of the law of procedure were thus treated in connection with substantive law and often only provided brief statements of rules governing which party was to produce evidence and which evidence was required. Apart from that, there was only slight variation in procedure: determining which jury was to settle a legal contest and with which part of the law or which object the legal contest was concerned. But in spite of these minor differences there are fundamental similarities that allow us to construct a comprehensive picture of the law of procedure in Jylland.

The Libel and the Summons—the Result of the First Ting

The accusation and the raising of issues had to be performed in person according to the Law of Jylland, so that there was a private case, i.e. there was no distinction between whether it was a criminal or civil procedure. If the injured party had died, was not legally competent or was in other ways legally incapacitated, the case could be initiated by a guardian, one of the nearest kin or by the *husbonde* on behalf of his *bryde* in cases of disputed property. However, if the case was concerned with violence committed against the *bryde* and his kin, the *bryde* had to initiate the case in person.¹¹²

There were a few exceptions to this. Firstly, cases of *ran*, where the case could be initiated by a different person than the one who swore that he had been the victim of *ran*. Secondly, cases of sacrilege, where the bishop's ombudsman *could* initiate the case. Thirdly, cases of theft, where the king's ombudsman *could* initiate a case if the injured party

¹¹² See for example JL I 43, II 20 and II 32.

did not.¹¹³ The idea that some crimes were public (*crimen publicum*), i.e. that they breached public peace, is known from Roman law,¹¹⁴ but by far the most common way of initiating a case that we find in the Law of Jylland was civil procedure. The starting-point was, as already mentioned, the accusatory character of the procedure, i.e. that one party claimed that another party had injured or inconvenienced the plaintiff. Cases were initiated in this manner by default, and it is nowhere apparent in the Law of Jylland that public officials generally took the initiative to initiate cases.

Thus the first step for the injured party was to *lyse* (publish) the case, i.e. to announce publicly the identity of the defendant and the nature of the suit.¹¹⁵ This could take place without any sort of introductory production of proof, unless the case concerned rape or malicious damage. In such cases it was necessary to produce witness that the plaintiff had suffered injury before the case was published. Such proof took the form of either an immediate report to other inhabitants of the village by the person who claimed violent sexual intercourse or the production of six witnesses to the nature and extent of the damage by the victim of malicious damage. If a 'case-initiating proof' failed, the defendant could defend himself with a jury of twelve of his own kin instead of having the case evaluated by the *sandemænd*.¹¹⁶ Thus it was only if the plaintiff was able to substantiate his accusation by witness that he could demand to have such cases decided by *sandemænd*, who thus must have been regarded as more difficult to convince by the defendant than it was for him to find the necessary number of compurgators. Such an idea was not an innovation in the Law of Jylland for we know about such 'case-initiating witnesses' and their consequential difficulties for the defendant in connection with killing in The Book on Inheritance and Heinous Crimes and Valdemar's Law for Sjælland and in the Ordinance on Manslaughter from 1200 where the competence of such an institution was extended to cases of wounding.

¹¹³ See JL II 65, JL II 79 and II 81 in addition to JL II 90.

¹¹⁴ See Dig. 48.10.30.1, Inst. 4.18.1, Inst. 4.18.5, Dig. 23.2.43.10, Dig. 48.1.1 in addition to Dig. 48.1.3., in which we also find mention of the personal suit.

¹¹⁵ See JL I 50, II 6 and II 10.

¹¹⁶ Concerning rape, see JL II 17, from which we may conclude that if the victim did not immediately tell someone about the crime her accusation would be regarded as untrustworthy. Concerning malicious damage, see JL II 33, while a detailed evaluation of the extent of an act of malicious damage was to be performed by the court's 'good men', see JL II 30.

The Law of Jylland stipulated that cases had to be initiated within a certain period of time. In cases of *ran* and sacrilege, the case had to be initiated within a year,¹¹⁷ but in cases of killing a case had to be initiated much faster. If a killing happened before noon on Thursday before a meeting of the *landsting*, which convened on a Saturday, the case had to be initiated at that meeting. However, if the killing took place after noon on a Thursday, the window of opportunity was so brief that the kin were allowed to wait until the next time the *landsting* convened a fortnight later.¹¹⁸ In chapter six of book two we find that a case before the *sandemænd* could not be decided in less than six weeks since it required three meetings, each two weeks apart. However, this time frame of six weeks did not tally with the fact that a case would only actually take four weeks from being published at the first *ting* until a decision was made at the third meeting of the *ting*. From the first to the second *ting*, a fortnight, and from the second to the third *ting*, another fortnight, which taken together is four weeks.

If the injured party did not publish his case within these terms, the king's permission was required—which had to be applied for and granted before “a year and a day”, which meant that the case could be initiated at the *ting* within one year and six weeks. This was governed by the premise that the initiation of the case happened within three *tings* after the king had provided permission.¹¹⁹ In such circumstances, the case would take its usual course, which meant that when the injured party had appeared before the *ting* and had published his case and the name of the defendant, the summons of juries and the defendant to the second meeting of the *ting* took place.

This was the case in cases that had been published correctly at the *ting*, but that such procedural steps were not always taken is clear from the possibilities provided by the Law of Jylland to end the case without the *ting*'s interference or to decide the case the old-fashioned way with the defendant's counter-proof.

In cases of killings where the king did not give his permission for a delay there was the surprising alternative of settling the case without recourse to the *ting* and without the evaluation of the *sandemænd*.¹²⁰

¹¹⁷ JL II 57 and II 84.

¹¹⁸ JL II 8 and II 6. The period between the two court sessions is made clear by JL I 50, II 6 and II 53.

¹¹⁹ JL II 9 and II 10.

¹²⁰ See Fenger, *Fejde and mandebod*, p. 417.

In chapter 13 of book two we find that the parties *at home* could agree that the defendant paid for his misdeed by paying a *mandebod* (*mannæ bōtær*), i.e. a ‘man-fine’ of three times eight marks or its equivalent in goods.¹²¹

In such cases in which the killer recognised his guilt but did not do so publicly, the king was to have the so-called *thæghæn giald*, which was a monetary fine of twelve marks known only from this one mention in the Law of Jylland. However, if the case continued its customary official process through the *ting*, the king was only to have a blood fine of three marks if the defendant admitted his guilt. If the defendant agreed to and had the ability to pay the fine, there was an economic incentive for the killer to let the case pass publicly through the *ting* because in that instance he was only to pay three times eighteen marks to the victim’s kin and three marks to the king, while in cases where it was—to a certain extent—secretly decided to pay a ‘man fine’ he had to pay three times eighteen marks to the kin and twelve marks as a *thæghæn giald* to the king. On the other hand, it was possible in such cases to negotiate a larger or smaller compensation depending on the circumstances of the case and the status and wealth of the victim and the killer. With the private settlement, the killer might have had the advantage of not having his name and reputation publicly spoiled.

While the private settlement thus on one hand secured that the victim’s kin received the same financial compensation as they would have if the case had been publicly conducted and on the other hand prevented the killer being publicly denounced, it meant that the king—unless he was informed about the settlement—did not receive any fines for the killing and therefore he probably wished to limit access to such private settlements by means of the *thæghæn giald* in order to secure his income regardless of the means by which the case was settled. Therefore, the *thæghæn giald* was probably also comparatively new when it was included in the Law of Jylland. Thus, it would have been introduced in order to encourage the parties to conduct the case under public scrutiny because otherwise the king might face the fact that far too many cases were settled without his knowledge, which would prevent him from accruing the monies that a killing brought. Even the time frames mentioned above were a part of this process

¹²¹ JL II 13: “Fæstæs boot hemæ...” The size of the fine is mentioned by, amongst others, JL II 9 and III 21.

because they put additional pressure on the remaining kin to initiate the case correctly, i.e. at the *ting*, because there was little time left to initiate negotiations with the killer.

In the same way, it was not a foregone conclusion that a published case had to involve *sandemænd* or other juries. In chapter 5 of book two we read “the person who demands the assistance of *sandemænd*...”¹²² which indicates that the assistance of *sandemænd* was something that could be demanded by a party but that it was not automatic. This is also evident in the section on wounding and fines for wounding in book three and the alternative to the assistance of jurors in such cases was that the defendant either acknowledged the wounds or defended himself with a jury of kinsmen.¹²³ In other places it is stated directly that the plaintiff and the defendant could agree proof by oath or choose jurors,¹²⁴ which clearly shows that the collection contained frequent possibilities of settling a case without involving the king and yet doing so publicly. Regardless of whether the plaintiff chose to allow the case to be decided by jurors or by compurgators, he was required to have made this decision before publishing the case at the *ting* and its subsequent summons of the jury.¹²⁵

The plaintiff might find this procedure advantageous in comparison to private settlement—firstly because by making the case publicly known he could ensure that the defendant’s willingness to acknowledge damage and his liability to pay a fine was known by all, in which case the plaintiff could expect public support if the defendant later refused to pay the fine. Secondly, if he had little proof of the defendant’s guilt this might result in an acquittal by jurors, so if he announced the case at the *ting* without involving jurors the ball was left in the defendant’s court, who thus had to prove his innocence if he denied his guilt. The advantage for the defendant was to receive a certain public protection in case he successfully abjured the accusation but found that the plaintiff’s kin refused to accept such proof and became a real threat to his life.

Apart from the possibility of entering into a settlement outside the *ting*, which left the parties without the protection provided by the fact that the case was initiated, decided and finished in the public sphere,

¹²² JL II 5 i *Jyske Lov*, p. 258, see DGL II, p. 145.

¹²³ See JL III 31. See also the similar rules concerning this in JL II 9.

¹²⁴ JL II 60 and II 97.

¹²⁵ This seems most obvious in JL II 97.

there were thus two procedural ways that the plaintiff could choose when he had published and thus publicised his accusation at the *ting*. Either he could demand the participation of jurors, which left him with a comparatively heavy burden of proof, or he could choose to let the case proceed according to what we must consider to be an older form of procedure, in which it was up to the defendant to abjure the accusation. There was thus a choice between the law of positive proof advocated by the Church, whose starting-point was that the accused was innocent until proven guilty, and the older negative law of proof, in which the defendant was innocent until the opposite was 'proven' by the help of negative proof, that is proof to the trustworthiness of the defendant, not about the substantial content of the case. This means that the Law of Jylland, with its procedural alternatives for initiating a case, favoured the plaintiff because he continued to have the possibility of using the older procedure with its negative proof, which would allow him to shift the burden of proof to the defendant if he had a weak case. Such a freedom of choice and bias towards the plaintiff may have encouraged more people to demand the rights that they felt to be theirs. The choice between the two forms of procedure can thus be seen as a concrete example of the fact that many parties wished to see that the largest possible number of breaches of the law was published, that conflicts were decided in the public sphere where their consequences could be limited and controlled.

At the same time, the continued existence of the older form of procedure is evidence that the new institutions of legal administration and the new law of procedure, which we must assume were part of a royal and ecclesiastical plan, were not accepted immediately at the local level.

The Start of Procedure—the Second Meeting of the Ting

At the second meeting of the *ting* both the jurors or *sandemænd* and the defendant appeared as a consequence of the summons published at the first *ting*.¹²⁶ We must presume that it was the *ting* that summoned the relevant jurors, but the summons of the defendant probably took place in the same manner as cases on land boundaries in which two men, who have may have been appointed by the plaintiff

¹²⁶ JL II 6 and JL II 39.

or by the unbiased *ting*, appeared at the defendant's house five days before a scheduled meeting of the *ting* to legally summon him to the next *ting*.¹²⁷ At least, this fits with the fact that two men were to testify that the defendant had been legally and correctly summoned at the second meeting of the *ting*.¹²⁸ If this was not the case, the 'proof' for a correct summons must have been a full *tingsvidne* (proof of the *ting*). According to the Law of Jylland, such proof consisted of at least seven men, the minimum number required for a quorate *ting*, who bore witness to what they saw and heard at a particular *ting*, and the proof of the *ting* was therefore such a strong proof that it could not be disproved.¹²⁹ In the kinds of cases where the proof of the *ting* was mentioned—such as the acknowledgement of illegitimate children by their father, *fledføring*, the transfer of land, the publication of valuable things that had been found and treasure trove¹³⁰—the demand for publicity was the over-arching principle of proof. Therefore it would have been the most trustworthy proof for the correct initiation of a procedure if the publication and summons of the defendant could only take place at the *ting*. In canonical procedure we find it emphasised time and time again that the summons had to be delivered correctly, that is with full publicity, so that the defendant was left no possibility of avoiding trial by claiming that he had not been summoned, but we do not quite know how this was undertaken in practice in Jylland in the High Middle Ages.

Regardless of practice, the institution of the *tingsvidne*, which received more attention in the Law of Jylland than in the other Danish medieval collections of law—for which reason we may argue that it was a relatively recent introduction¹³¹—at least testifies to an increased concern with the publication of legal contests. That the 'legal and correct summons' was oral is in accord with the practice that we also find in transfers of land and in canon law. Previously, the two parties had

¹²⁷ See JL I 50.

¹²⁸ JL II 39. The emphasis of the need for a public summons is most clearly expressed in canon law, especially Lat. IV, c. 38, see Hermann Dilcher, *Die Sizilische Gesetzgebung Kaiser Friedrichs II. Quellen der Constitutionen von Melfi und ihrer Novellen* (Böhlau, Köln and Wien, 1975), pp. 377–378.

¹²⁹ See JL I 37 and I 38.

¹³⁰ See JL I 21, I 32, I 37 and II 111. If gold or silver is found it is not necessarily to be published in court, but the treasure must be handed over to the king's ombudsman, see JL I 12.

¹³¹ Poul Johs. Jørgensen, "Vidnebeviset i Jyske Lov", ed. Erik Reitzel-Nielsen, *Med Lov skal Land bygges* (Copenhagen, 1941), pp. 315–361, esp. 348–352.

apparently agreed such transactions individually and privately, but the Law of Jylland acknowledged only those transactions that had taken place publicly at the *ting*. More documented private transfers survive from the beginning of the thirteenth century, but even though the number of such documents increases as the century wears on (possibly as a result of an increasing survival rate in this period) these documents were not considered full proof of the transfer of property until the end of the century, i.e. the rules of the provincial laws concerning *tingsvidne* maintained oral proofs as the primary proof while written documentation only served a secondary function.¹³² This indicates an obvious bias against literacy as worthy of trust, and the fact that agreements, court cases and such like were transacted orally meant that everyone in society had the possibility to follow and know about what had happened and about the state of the trial regardless of their own literacy.¹³³ Indeed, written documentation is only mentioned once in the Law of Jylland, namely in connection with testamentary bequests.¹³⁴

It is not stated directly in the discussion of the *sandemænd*, but it must have been the intention of the second *ting* that both the selected jurors and the defendant were to be given insight into the plaintiff's complaint, wherefore "the first *ting* was made new"¹³⁵ in such a way that two men witnessed the fact that the publication of the case (and as already mentioned the summons) had been performed correctly. After the *ting* had thus been made new, "the person who initiated the case must produce an oath".¹³⁶ Such an oath is not found in other sources, but only makes sense if we assume that the plaintiff was to produce an oath that he had initiated the case from an honest conviction (possibly even just a suspicion, which was enough in cases of *ran*)¹³⁷ that the defendant had actually committed the transgression of which he

¹³² Michael H. Gelting: "Circumstantial Evidence: Danish Charters of the Thirteenth Century", eds. Paul Barnwell and Marco Mastert, *Medieval Legal Process. Physical, Spoken and Written Performance in the Middle Ages* (forthcoming).

¹³³ See Per Andersen, "Fra mund til skrift—når rettens tilgængelighed afpersonaliseres", ed. Per Andersen, *Om rettens tilgængelighed* (Copenhagen, 2009), pp. 9–31.

¹³⁴ See Peter Skautrup, *Hardiske Mål II. Kildekritiske Forudsætninger I* (Århus, 1942), pp. 48–60, and JL III 45 (after 1241). See JL II 21 on the lack of written record.

¹³⁵ See JL II 39 in *Jydske Lov*, p. 264, and DGL II, p. 210. On the lack of reference to this, when concerned with the *sandemænd*, see JL II 6.

¹³⁶ JL II 39, see *Jydske Lov*, p. 264, and DGL II, p. 210.

¹³⁷ JL II 106.

was accused. If this is how it took place, this oath is comparable to the oath of calumny known from both Roman and canon law.¹³⁸ If the accusation was made maliciously, and if the plaintiff did not pursue the case correctly, he was due to pay a fine of three marks to both the king and the defendant—since this was what the defendant was to pay to receive his peace back—after which the defendant could produce a lesser proof of twelve compurgators regardless of the nature of the alleged transgression against the law.¹³⁹

In the section on jurors—chapter 39 of book two—the second *ting* is called the *withær mals thing* (the response *ting*), and this must be interpreted as a command to the defendant to enter a plea, i.e. he was to declare himself either guilty or innocent. It was also at this point that the defendant was to give his opinion on whether the transgression had happened intentionally.¹⁴⁰ After this, he was to perform proof for his plea as demanded by the procedure that the plaintiff had chosen at the first *ting*. If the defendant admitted to his guilt before the plaintiff produced his oath of calumny the jurors were of course not obliged to decide the case and nor was the defendant liable to pay additional fines to the king. Thus the defendant could avoid standing trial almost without penalty—a feature that this law shares with canonical procedure.¹⁴¹

In terms of its subject, the second *ting* had the aim of deciding what the case was about and what the parties' positions were. Thus the second *ting* in the Law of Jylland's law of procedure served exactly the same function as the *litis contestatio* known from Roman-canonical law: to secure that the plaintiff sued in earnest and that the parties agreed about the contested subject matter. In this manner there would

¹³⁸ See Kaser, *Das römische Zivilprozessrecht*, pp. 630–632. This takes its model from Cod. 2.58.1–2, Inst. 4.16.1, Dig. 10.2.44.4, Nov. 49.3 and Nov. 124.1 in addition to 1 Comp. 1.34.6 (repeated in X 2.7.5) and 3 Comp. 1.26.1 (repeated in X 2.7.6), and was also valid for advocates to express their willingness to uncover and obscure the truth, see Brundage, "The Calumny Oath and Ethical Ideals of Canonical Advocates", and Fraher, "Preventing Crime".

¹³⁹ JL II 40 and II 71 in addition to II 108. The principle of Talion—an eye for an eye and a tooth for a tooth for the crime of entering a false accusation—is known from Roman law (Cod. 9.2.17 and Cod. 9.46.10) and canon law (C. 2 q. 3 c. 2, C. 2 q. 8 c. 4 and C. 5 q. 6 c. 2). Cod. 9.46.3. allows for this principle to be overlooked if it was impossible to prove that the false accusation had been made knowingly, see Kaser, *Das römische Zivilprozessrecht*, pp. 630–632.

¹⁴⁰ See JL II 48.

¹⁴¹ See JL II 39, JL II 81 and II 95 in addition to II 113 and Cod. 2.4.18, Cod. 9.1.3.1 and Dig. 5.1.10, in addition to 3 Comp. 5.1.14.

be no doubt that both parties understood what the case was about. It thus marked the point of no return for both parties, who were henceforth bound to proceed in the case.¹⁴² According to the Law of Jylland, it was impossible to withdraw an accusation or a plea after the production of this oath.

Of course all this happened only in those cases where the jurors and both parties appeared. If a juror or the plaintiff had an admissible excuse, it was necessary setting the date for another *withær mals thing* and this could happen twice, but after a third absence the *ting* would proceed to its final meeting regardless.¹⁴³ In other words the defendant could in practical terms delay his appearance until the third *withær mals thing* and thus in reality until the fourth *ting*, as we also find in Eric's Law for Sjælland. We can presume that if the defendant remained absent without valid reason he lost the case. It is rather surprising that this feature is not mentioned in the Law of Jylland, but it is commonly found in the other law collections. However, the Law of Jylland is emphatic in its rule that a *sandemand* who was absent without admissible excuse was to lose his *hovedlod*.¹⁴⁴

Proofs and Sentences—the Deciding Third Ting

The production of proof must have taken place at the third *ting*. It is not explicit in the Law of Jylland but this is the assumption that must be made on the basis of the rules. If the defendant had only been familiarised with the contents of the claims against him at the second *ting*, he must by necessity have been given time to assemble his proof and in practice this must have meant that he could only produce these at the third *ting*.

As a starting-point, the production of proof itself seems to have been brief. The plaintiff stated his case and produced the necessary proofs and after that it was the defendant's turn to present his proofs, which mostly consisted of counter-oaths. The Law of Jylland contains clear demands about who was to produce proof in any given case and about the kinds of proof that was necessary. For this reason, this part of the procedure must be characterised as fixed, in the manner of the

¹⁴² Concerning *litis contestatio* in post-Classical Roman law, see Kaser, *Das römische Zivilprozessrecht*, pp. 587–595.

¹⁴³ JL I 50 and II 7.

¹⁴⁴ JL II 7.

other Danish provincial laws. In addition to the formal demands of the plaintiff's proofs or defendant's counter-proofs, which are mentioned by the law, the jurors, as we have mentioned above, must have had the possibility of discussing the case based on their existing knowledge—as it was the local *sandemænd* from the jurisdiction of the misdeed who were to weigh the case¹⁴⁵—or from the knowledge that they had gained from the proofs. To a certain extent this may also have meant that they could enquire into the proofs or examine the witnesses and the compurgators.¹⁴⁶ Subsequently, the jurors pronounced their decision after they had been given a command (*dom*) by the *ting* to do so. Indeed, the jury had probably already reached a decision in consultation with the men of the *herred* who had appeared at the *ting* in order to avoid a conflict with the majority or the most influential men.

When a sentence had been passed the defendant was either free of guilt or had to pay a fine according to fixed tariffs, as was required by the individual case. As mentioned above, there was no possibility of an appeal unless objections were raised against the sentence or the jurors by the local community. So the losing party appears to have only been able to change the verdict by initiating a new case.¹⁴⁷ If he did not accept the sentence and pay, he would lose his peace and be declared an outlaw.

Regardless of the outcome of the case the plaintiff had to pay transportation costs—the so-called *hæstæ leghæ* (horse hire), which the *sandemænd* were to receive for their participation in the case if the plaintiff had chosen this kind of procedure.¹⁴⁸ The horse hire became payable at the *ting* where the *sandemænd* pronounced their decision—that is, at the third *ting*, which incidentally also meant that the payment was witnessed by the *ting*. Horse hire is only mentioned in connection with the *sandemænd* and this must mean that all other jurors were only required to swear at their local *herredsting* while the *sandemænd*, in most cases, had to appear at the *landsting* or travel locally in order to decide cases concerning boundaries. There were thus no other costs

¹⁴⁵ See JL II 1, II 3 and II 4.

¹⁴⁶ If a land-owning freeman gave shelter to a culprit who would not conform to a sentence, this action meant that the freemen would be automatically sentenced if such a case was initiated, see JL II 68.

¹⁴⁷ This was emphasised by later legislation, see Thords Art. 36 and (in part) 22. See Jørgensen, "Biskop and bedste Bygdemænd", p. 99.

¹⁴⁸ JL II 5.

involved in prosecution, but both parties faced the risk of having to pay fines.

Like the other Danish provincial laws, the Law of Jylland does not mention many different kinds of proof. The proofs that are mentioned fall into two main groups: positive proofs, with which the plaintiff intended to prove the defendant's culpability, and negative proofs, with which the defendant defended himself against the accusation. As was clear from my analysis of the early Danish laws, the most common proof in medieval legislation was negative proof, which implicitly meant that the defendant was guilty until proven otherwise, i.e. that the burden of proof rested in the main with the defendant.

This did not fit well with the ethical administration of justice that the Church wished to encourage also in the secular sphere, and for this reason the Church laboured to replace the negative proofs with positive proofs. For Denmark this can be found in a few papal letters: one sent by Pope Honorius III to Archbishop Anders Sunesen in 1217 and one from Gregory IX directed at King Valdemar II in 1239. In the former letter, the pope prohibited clerics' use of negative proof in Church courts and in the latter the pope complained about the Danish practice of using negative proofs in a specific case concerning a refusal to hand over lands to the bishop of Roskilde.¹⁴⁹ The result of Gregory IX's letter in particular may be seen in the Law of Jylland, which states as a fundamental principle that a man must always be closer to proving his right than his opponent is to disproving it.¹⁵⁰

In practice this demand for proof appears to have been introduced into the Danish provincial laws by demanding that the plaintiff (in accordance with canon law) needed to produce two witnesses for his case,¹⁵¹ that is, two witnesses that had either been present at the criminal or economic transactions dealt with by the case or who 'knew' something about them,¹⁵² or by introducing juries, which were to weigh the contradictory pleas and proofs produced by the plaintiff and

¹⁴⁹ See DD 1:5:120–22 and DD 1:7:27.

¹⁵⁰ See JL I 49.

¹⁵¹ For a discussion and precision of the concept of witness in JL, see Jørgensen, "Vidnebeviset". The demand for two witnesses is found in the Bible in Deut. 17.6 and 19.15 in addition to Matth. 18.16, Joh. 8.6, 2 Cor. 13.1 and Hebr. 10.28, while canon law mentions it in C. 35 q. 6 c. 11, X 2.20.23 and 28 in addition to X 3.26.10–11. Two witnesses are also mentioned as full proof in SkKl 5 and 11 in addition to SJKl 8.

¹⁵² See for example JL I 50 and III 37, and Brundage, *Medieval Canon Law*, pp. 141–142.

the defendant.¹⁵³ That the Law of Jylland upgraded the institution of the jury in Danish practice appears to have meant that there was a less restrictive attitude to the demand that the plaintiff needed two witnesses for his case, possibly because it was often impossible to produce them. In any case, this demand is only found in a few places in the Law of Jylland compared to some of the early provincial laws, which often demanded two witnesses to the initiation of the case in order to have the case decided either through hot irons or juries.¹⁵⁴

That positive proof by witness thus occupied a modest place in Danish procedural law meant that, despite the stated intention that a man should always be closer to proving his right than his opponent was to disproving it, it was still in practice up to the defendant to argue his innocence. Thus it was still the negative proof that dominated in the shape of compurgators who swore an oath to the trustworthiness of the defendant and not the facts of the case, even though the production of these did not necessarily lead to a dismissal of the case according to the Law of Jylland—the juries were still the guarantors for this.

In contrast to the other Danish law collections, the Law of Jylland operated with two fundamentally different types of compurgation. For both types, the number of compurgators was based on the number twelve and determined in accordance with the transgression's nature and severity.

The common proof by oath was thus the *tylvtered* (oath of twelve), that is an oath produced by twelve compurgators appointed by the defendant, who in chapter 35 of book three are characterised as 'legal' proof.¹⁵⁵ It was this sworn proof that we find in earlier Danish provincial laws and the twelve compurgators were thus in their graduated forms the most commonly used means of proof in Danish medieval law.¹⁵⁶ The extent and survival of the proof by oath is probably because it was seen as a strong proof and that friends and relatives risked their name and honour for the defendant. In Anders Sunesen's Paraphrase of The Law of Skåne we find the phrase that "wise men place more emphasis on a spotless name and reputation than on money"¹⁵⁷ (which

¹⁵³ See Thords Art. 22.

¹⁵⁴ Jørgensen, "Vidnebeviset".

¹⁵⁵ JL III 35.

¹⁵⁶ Examples can be found in JL I 34, III 33 and III 35.

¹⁵⁷ See ASun 46 in DGLN I, p. 131.

by the way also seems to have been the case in the few surviving early Germanic tribal laws that use the compurgation of twelve men).¹⁵⁸

A possible explanation for the extensive use of this means of proof *might* be that the proof was the first method of proof introduced successfully by the Church to the Danish administration of justice, for which reason it was still widely regarded as full proof in the thirteenth century. The number twelve in Christian numerology signals perfection since twelve is the number of months, the zodiac, the disciples and the apostles. Even in the Old Testament the number twelve had a particular significance since it was the number of tribes in Israel and the number of showbread, which was man's usual sacrifice to God.¹⁵⁹ In the Danish connection there is also the fact that the earliest mention of twelve compurgators or jurors comes out of the Church Laws of Skåne and Sjælland.¹⁶⁰ That the number should be twelve in both the Danish law codes and in for example the German *Sachsenspiegel* from the 1220s¹⁶¹ may indicate that the number comes from common agreement about what the right number of compurgators should be. If this is the case it may explain the canonists' ambivalence towards compurgation, which in principle was prohibited by Scripture but which they recognised could be the only counter-balance to direct lies.¹⁶² In connection with the Law of Jylland's changed direction towards a freer and *ting*-decided evaluation of the proof, compurgation became a subsidiary proof rather than its earlier position as one of the primary means in proof in the older, formalistic, purely accusatory type of procedure. This was a development that only appeared in Norway a generation later, during the reign of King Magnus Lagabøter.¹⁶³

¹⁵⁸ See Lupoi, *The Origins of the European Legal Order*, pp. 340–348.

¹⁵⁹ See Lisbet Müller and Mogens Müller, *Politikens Bibelleksikon* (Copenhagen, 1992), p. 68 (*Disciple*), 291 (*Skuebrød*), 300–301 (*Tal*) and 315 (*12*).

¹⁶⁰ See SkKl 3, 4, 5, 6, 7, 11 and 12 in addition to SJKl 5, 7, 8, 9, 10, 11, 12, 17 and 20.

¹⁶¹ R. Lieberwirth, "Sachsenspiegel", *LdM* VII, cols. 1240–1042. My thanks to Helle Vogt for drawing my attention to this.

¹⁶² See C. 16 q. 3, c. 7, X 2.19.2 and X 2.24.36 to Matt. 5:34.

¹⁶³ See Lars Hamre, "Kommentar til Hans Eyvind Næss", *Norsk Historisk Tidsskrift* [hereafter NHT] 70 (1991), pp. 202–211, and compare this to Hans Eyvind Næss, "Mededsinstituttet. En undersøkelse av nektelsedens utbredelse and betydning i norsk rettsliv på 1600-tallet", *NHT* 70 (1991), pp. 179–201. This is the case for several of the principles found in JL, for example the prohibition against a freeman carrying out an execution by hanging since this falls to the ombudsman in order to avoid an accusation of revenge, which would allow such an execution to develop into a feud, see Steinar Imsen, "Den gammelnorska drapsprosessen", *NHT* 88 (2009), pp. 185–229, esp. 186, 191–195.

The oath of twelve is not the most unique of the proofs that we find in the Law of Jylland: that is the *kønsnævn*. The word comes from *køn/kyn* which means kin and the twelve members of such juries were selected within three generations of the defendant's kin in the *sysse* (or *bygd*), i.e. the region of Jylland where the case was initiated. However, in one version of the later Thords Articles the number of generations was extended from three to four to overcome the problem of finding twelve men from the defendant's kin inside the boundaries of the *sysse*.¹⁶⁴ Apart from the name, the unusual thing about this institution was that these compurgators, who were to produce an oath in support of the case of the defendant, were nominated by the plaintiff while ordinary compurgators were normally nominated by the defendant himself. The members of the *kønsnævn* could not be declared open enemies of the defendant and if they were so identified through the oaths of twelve men, the defendant could exclude three of those appointed and in addition the defendant had the right to exclude three of the twelve without explanation.¹⁶⁵

Kønsnævn is used in the Law of Jylland in cases of dowries, in cases of disputed inheritance between step-siblings¹⁶⁶ and as a sworn counter-proof in some cases of wounding.¹⁶⁷ Internal familial disagreement was decided by *frænder* (*amici* in medieval Latin), that is by an internal arbitration by the kin, which was the group which was also to acknowledge property transfers, etc.¹⁶⁸ To a lesser degree the *kønsnævn* seems to have been a counter-proof in cases where there were

¹⁶⁴ Thords Art. 63 (text 2). In accordance with the rules of the duty of kin to pay fines with a kinsman, JL aligns itself with the rules of canon law that extend this duty to four generations, see JL II 25. There may be a similar problem in JL II 104 dealing with the necessary proof when a man is accused of withholding an animal that the plaintiff has left stabled with the accused. A later edition says that the defendant in such cases must defend himself with the compurgation of 12 men in addition to two witnesses, but according to the text found in several of the oldest manuscripts the two witnesses must be jurors. It must have been difficult to find two men who met the requirement of being both jurors and had sufficient knowledge of the facts of the case, for which reason the rule was probably later changed to call for two unspecified witnesses, see DGL II, pp. 334–335, textual variants.

¹⁶⁵ The fundamental rules for *kønsnævn* can be found in JL I 1. See Stig Iuul, "Medesmænd", *KLNM* XI, cols. 515–516, and Jørgensen, "Vidnebevist", p. 324.

¹⁶⁶ JL I 13 and I 15, while disputes between step-families were to be decided by arbitration by a *kønsnævn* made up of members of both families, see JL I 20 and esp. I 18.

¹⁶⁷ See JL I 44, I 45, III 24, III 31, III 32, III 34, III 35 and III 36.

¹⁶⁸ See JL I 16 and I 41.

grounds for suspicion that the defendant was not guilty, for example in cases about clandestine intercourse.¹⁶⁹ In addition, the *kønsnævn* is classified as a ‘minor’ proof compared to the decision of the *sandemænd*, probably because it was easier to produce such a jury than to persuade the *sandemænd* of the defendant’s innocence.¹⁷⁰ At least, it seems in general that the *kønsnævn* was the defendant’s counter-proof if the plaintiff did not produce proper proof, i.e. could prove his case with the demanded witnesses—even though the plaintiff nominated the members of the *kønsnævn*, the defendant was better-off than the ordinary proof, since the members were picked out of his kin.

Apart from its mention in the Law of Jylland, *kønsnævn* is only named in one instance in the Church Law of Skåne, where it is used in connection with decisions concerning how the parties implicated in a case were related, and in the much later 1284 Nyborg Statute for Sjælland attributed to Eric Klipping in which a man who had sheltered an outlaw could swear himself free with the help of a *kønsnævn*. The original jury in the 1284 statute must be the jury of the *herred* since this is named in all manuscripts apart from one, where it is written on top of an erasure.¹⁷¹ In a comparable chapter in the Church Law of Sjælland, those persons who were to swear to the degree of kinship are called *nævn i sin slægt* (‘jury in his kin’), which echoes the idea of the *kønsnævn*. However, this is a concept that we find in other parts of the Law of Jylland.¹⁷² In addition two chapters of The Law of Skåne and one chapter of Eric’s Law for Sjælland match one chapter of the Law of Jylland, which concerns the inheritance rules for children although they do not explicitly name *kønsnævn*.¹⁷³ We also find in rules in connection with denying rape in Valdemar II’s Ordinance of Ordeal by Hot Iron a mention of institutions that in practice are what in the Law of Jylland are called *kønsnævn*.¹⁷⁴ So, even though the *kønsnævn* is not commonly mentioned, we must conclude that by the start of

¹⁶⁹ JL II 18.

¹⁷⁰ JL II 17 contrast this to *kønsnævn* in II 18, see DGL II, p. 171.

¹⁷¹ See DRL 1:16, § 3, textual variant.

¹⁷² See SkKI 7 and SJKI 10 i DGLN II, p. 233, see DGL VIII, p. 450. For the same term in JL, see JL III 36 (DGL II, pp. 426–427).

¹⁷³ See SkL 2 and 4 and ASun 1 in addition to ESL I, contrast to JL I 1. Iuul, “Mededsmænd”, thinks that SkL contains a reform inspired by JL but if that is the case it appears odd that this kind of oath is not found in other chapters that deal with similar problems to JL and utilise *kønsnævn*.

¹⁷⁴ DD 1:5:96, § 4.

the thirteenth century it was not unknown to let the defendant's kin produce counter-proof and this was the case in both inheritance law and criminal law. The institution of the *kønsnævn* as a means of proof, is however, only found in the Law of Jylland.

Just as the proofs were fixed according to the seriousness and nature of the transgression, so were the sanctions imposed after sentencing. If it was proven that the law had been broken or if counter-proof was unsuccessful, a particular sanction was imposed according to the nature of the transgression, graduated by the seriousness of the transgression. The medieval law of sanctions as it was expressed in the Law of Jylland and other earlier Danish provincial laws was not so much about punishment, which was often impossible because of the lack of public powers to execute such punishment, but was rather concerned with providing satisfaction for the injured party and his kin through the help of predetermined fines and rules for the payment of these. In addition there was a certain element of prevention that included a punishment, which according to the Danish medieval collections of law usually consisted of a fine, which was a natural extension of the rest of the laws of sanctions.

According to the canons of the Law of Jylland, the sanction of a fine was always to be paid to the injured party, but in addition the king played an important role in comparison to other Danish codes of law as he received the punitive fines. The king, however, renounced his right to a fine in those cases where the defendant admitted his misdeed at or before the second *ting* or in cases where the defendant, through compurgators or *kønsnævn*, provided convincing proof that the injury had been unintentional, for in such cases the Law of Jylland stipulated that it was only the injured party who was to receive a fine, just as was the case in the other provinces.

Each transgression against the law was treated without reference to previous cases meaning more severe sanctions were not imposed for repeat offenders except in the case of repeated theft, where the royal ombudsman was entitled to hang the thief immediately, as was also the case where a thief was caught red-handed.¹⁷⁵ In a number of

¹⁷⁵ JL III 23. Concerning hanging for theft without sentencing see JL II 89 and esp. II 87, in which we find that the ombudsman can hang the thief because of right and power, but not because of revenge, which would have been the case if it was the victim who hung him—this is a clear statement that the correct procedure is for public execution. Ordinary early canon law allowed for the execution of a thief who was

circumstances intentionality was taken into account and could result in larger fines than normal. In cases of killing it was seen as an aggravating factor if the killing had happened at a public gathering or in the victim's own house, at the *ting* or travelling to the *ting*, in church or in the churchyard, or in the *herred* or the borough in which the king was present. The same was the case if the killing had been perpetrated with a knife¹⁷⁶ or if the victim had been a working peasant engaged in his labour. In all these cases the culprit stood to pay a full *mandebod* (man fine) to the kin, in addition to which, if there were aggravating circumstances, he was required to pay forty marks to the kin and another forty marks to the king. That at least was the case in the oldest version of the Law of Jylland: the extra forty marks fine to the king is not mentioned in later editions of the code.¹⁷⁷

If the defendant was found guilty but refused to accept the sentence, he also lost his *mandhelg*, i.e. he became an outlaw. Outlawry seems to have been introduced in Denmark in the eleventh century as the ultimate punishment for the most serious transgressions against the law,¹⁷⁸ possibly inspired by the ecclesiastical punishment of excommunication.¹⁷⁹ Having become law-less, the outlaw could be beaten or killed with no consequences for the assailant and if the *mandhelg* was claimed by the plaintiff the mere fact that it was sought immediately made the case more serious and the defendant needed to pay a fine to the plaintiff and to the king.¹⁸⁰

caught red-handed in cases where it was necessary to protect oneself or one's property and no other avenue of action was left open. See Kuttner, *Kanonistische Schuldlehre*, pp. 346–348, 375–379. According to Roman law, a thief that was caught red-handed could not be set free on bail, see Dig. 48.3.3, Dig. 48.3.5 and Dig. 48.19.27.2.

¹⁷⁶ See Fenger, *Fejde and mandebod*, p. 418, n. 248, and DGLN III, pp. 175–176, for considerations on the incomprehensibility of seeing the use of a knife as an aggravating circumstance in murder cases.

¹⁷⁷ JL III 22, See DGL II, p. 399, textual variants, and Riis, “Det ældste håndskrift af Jyske Lov”, p. 50. Concerning a later, more lenient, punishment for theft, see Riis *ibid.*

¹⁷⁸ See, *Altnordische Rechtswörter*, pp. 153–166.

¹⁷⁹ See Elisabeth Vodola, *Excommunication in the Middle Ages* (Berkeley and London, 1986), pp. 70–87. Lupoi, *The Origins*, pp. 368–387, draws attention to the fact that the possibility of expelling an unpopular member of society or isolating this person socially was and remains a common phenomenon in many cultures. For this reason he argues the institution of outlawry is not unique to Germanic tribal society as was argued previously. In addition to this outlawry is not mentioned as such in Germanic tribal laws from the sixth, seventh and eighth centuries. Also Fenger, *Fejde and Mandebod*, pp. 421–428.

¹⁸⁰ See JL III 27 and III 28.

Losing one's peace, however, did not mean losing everything for the Law of Jylland followed the tradition of several earlier provincial laws in allowing the outlaw to buy back his peace and thus his protection in law. As a starting-point, the outlaw had to reconcile himself with the plaintiff or the victim's kin, i.e. he had to acknowledge the sentence or settle with the plaintiff kin, following which he was granted the possibility of settling with the king by paying the fine that had been fixed.¹⁸¹

Regardless of the proof demanded and of the type of case, responsibility for the transgression rested with the person: the starting-point of the law was that it was only the defendant who would face the court.¹⁸² This focus on the individual transgressor, however, did not mean that the court took the individual into account in its sentencing because, while Danish law followed the example of canon law by increasingly distinguishing between intentional and accidental transgressions, it did not take into account the individual circumstances of the culprit such as age, mental state, etc. and the Law of Jylland continued the Danish tradition of fines that were fixed in relation to the extent of the damage.¹⁸³ The Law of Jylland thus sits between objective and subjective responsibility, a distinction that was still being worked on at the time, and the right to self-defence, which is also found in the law, must be seen in this light as an early expression of the passage from an older principle of justice based on equilibrium to a new one based on equity.¹⁸⁴ This is a tendency that can be discerned in some of the earlier laws.

In cases of killing, which often had severe economic consequences—but only in such cases¹⁸⁵—the killer was personally liable for the fine. However, having paid the fine he could sue his kin to receive from

¹⁸¹ See JL II 21.

¹⁸² See JL II 96, II 98, II 99, II 100 and II 110.

¹⁸³ See for example JL III 34 and III 35.

¹⁸⁴ JL III 22. For the argument that the idea of time in this period made up part of the reason for the change from objective to subjective guilt see Jørn Øyrehagen Sunde, "Lov and ånd—eller om tilhøvet mellem tidsforståning and rett", *Retfærd* 94 (2001), pp. 20–39, and *Speculum legale—Retsspejelen. Ein introduksjon til den norske rettskulturen si historie i eit europeisk perspektiv* (Bergen, 2005), pp. 153–154. See also Imsen, "Den gammelnorske drapsprosessen", pp. 195–199. Thank you Michael H. Gelting for drawing my attention to this. For the development in Denmark, see the classic analysis by Stig Iuul, "Den gamle danske strafferet and dens udvikling indtil slutningen af det 18. århundrede", eds. Leif Beckman and Herluf Petersen, *Kampen mod forbrydelsen I* (Copenhagen, 1951), pp. 237–294.

¹⁸⁵ See for example JL II 27.

them the share that they were legally obliged to pay.¹⁸⁶ The Law of Jylland gives extensive rules regulating the contributions from members of kin,¹⁸⁷ which indicates a close supervision of this. While Danish legal historians have previously assumed that kin as a subject of the law was losing importance in the thirteenth and fourteenth centuries,¹⁸⁸ recent studies of individual institutions of law in the Nordic provincial laws have produced convincing arguments that the provincial laws in fact introduced a new and gradually more well-defined concept of kin that eased conflict and, to a larger extent than before, tied individuals to a larger responsible and thus conflict-reducing group of kin.¹⁸⁹ So when kin were obliged to pay fines, they must be assumed to have tried to restrain those kinsmen who were prone to violence and outbursts of temper.

Summary

In attempting to draw a number of general connections between developments in Danish procedural law as found in the provincial laws of the High Middle Ages, it is necessary to remember that each individual provincial law was only formally valid in one province, in which it was also written down, apart from The Book on Inheritance and Heinous Crimes, which was probably intended to be valid for the entire kingdom. This means that there may have been many similarities between procedure in the individual provinces and *herreder*, but that there were an equal number of differences between them. Disregarding these, usually minor, differences for the time being and turning our focus to the many similarities, we find a picture of a number of institutions that administrated justice and a law of procedure that saw a rapid development during the thirteenth century.

Danish medieval procedural law was accusatory, i.e. one party initiated proceedings against another party for a transgression against the law, after which the parties produced proof and counter-proof to each other and to the *ting*. According to the earliest collections of laws, the latter was only to check that the proceedings went according to form

¹⁸⁶ JL II 27, see DGL II, pp. 193–194.

¹⁸⁷ See for example JL II 22, II 24, II 25 and II 27.

¹⁸⁸ For example Fenger, *Fejde and mandebod*.

¹⁸⁹ Vogt, *The Function of Kinship in Medieval Nordic Legislation*.

and whether the defending party had been able to reject the plaintiff's case by producing the kind of counter-proof demanded by the law for every conceivable case. Thus we find that proof was fixed and 'negative' and that the defendant was believed guilty until proven otherwise.

Such a type of procedure must almost have been automatic since there was no strong central power that could put its authority behind an alternative type of procedure or sentencing. In the absence of authorities, the parties simply had to settle matters between themselves. Proofs therefore had to be objective since there was no institution that could evaluate them. This situation changed significantly during the thirteenth century.

The two most recent provincial laws, Eric's Law for Sjælland and the Law of Jylland, point out that the *ting* is intended to uncover the truth in a dispute rather than, as in the older collections of law, just letting proof and counter-proof decide the case alone. In these two laws we find a movement away from the so-called *Beweisurteil* towards granting the possibility and the duty to uncover the truth to those juries that, following the lead of canon law, had been charged with investigating cases that required the most difficult counter-proof of all—the carrying of hot iron. By necessity this must have included the possibility to question the parties and their witnesses about the case and thus inquisitorial powers were given to the jurors. It also seems to be a consequence of this that the Law of Jylland introduced a number of permanent juries who individually were to evaluate proofs within certain types of cases so that they attained certain knowledge of inquisitorial technique and specialised knowledge of particular types of cases. In other words, we find a certain degree of professionalization amongst the jurors.

According to some provincial laws—and this seems to be an increasing trend during the thirteenth century—the jurors' decisions were not final sentences, as we have seen above. In several instances, local men were given the power to reject the jurors' decision. If a sentence was to be carried out, a local consensus was necessary and therefore the jurors had to weigh their evaluation against that of the local population. This was the case both if the jurors were unanimous in their decision and if it was made by simple majority, which according to late provincial laws was acceptable and legal. In the same way we also saw that the local royal official—the ombudsman—was granted increasing powers, especially in the latter half of the century. As the royal influence over the administration of justice and the king's right to fines increased, the

number of tasks assigned to the ombudsman increased as well, both in terms of raising these fines and swearing in jurors *or* even selecting these. And in the last part of Eric's Law for Sjælland, which dates from the last years of the thirteenth century, the ombudsman was given the right to initiate cases in certain instances.

However, it was not always necessary for a case to be raised. According to all the provincial laws, it was possible to compromise before a case got as far as formal initiation. The victim and the offender could agree a sum that the offender should pay to satisfy the victim. The increasing mention of this possibility bears witness to the fact that the alternative to a formal legal procedure must have been relatively commonly used *but* also that it was eventually necessary to regulate access to this so that the culprit could not deny his responsibility or paying the fine due to the king, which would have been consequential on him losing the case. Thus in both Eric's Law for Sjælland and the Law of Jylland a victim had the option of choosing the type of procedure—initiating a case or settling out of court—that suited the kind of proof that he was able to produce to support his case. The plaintiff in this period was therefore in a stronger position, although the law increasingly focused on ensuring that plaintiffs did not proceed maliciously. This was always the case, even in the most serious transgressions against the law in which the *sandemænd* were to pass sentence, and the possibility for settlement was thus not only limited to, for example, cases of private or civil disputes but was also extended to criminal cases.

The economic interest—the king's right to a part of the fines—in public procedure was challenged by the common right to settlement without involving the *ting* or a formal case, but in the Law of Jylland this trend was countered by introducing a special fee that was to be paid to the king in case a settlement was reached and thus the king seems to have recognised or at least to have accepted such private settlements. On the other hand, the parties in such cases avoided having their names drawn to the attention of the public and secured themselves against larger financial outlay for fines or for the conduct of a case and therefore it is possible that settlement would have been the preferred option in most cases—since this left the parties in some control of the consequences of the case.

If a case was initiated the law developed towards increased regulation of procedure. *Firstly*, increased attention was paid to ensuring that the defendant was summoned correctly to appear before the *ting*

in a manner that was provable. *Secondly*, the time frame for personal appearance and the production of objections against procedure was increasingly subjected to regulation so that it became more and more difficult for the defendant to escape or delay a case. *Thirdly*, according to the Law of Jylland the parties publicly acknowledged that they were agreed on what the case was about so that one party could only object on grounds of procedure to a limited extent as the case progressed. This is testimony to the fact that there must have been a consideration of how the administration of justice was to be controlled and made more efficient so that cases could be decided more quickly and more equitably than had previously been the case. Danish procedural law was, quite simply, living law, i.e. law that changed and adapted to changing demands and new problems.

CONCLUSION PART ONE

PROCEDURAL LAW IN THE THIRTEENTH CENTURY

In April 1213, Innocent III summoned all bishops, abbots, representatives of cathedral chapters, the Christian mendicant and military orders, and kings and other secular princes to a council that was to take place in the Lateran Church in Rome in November 1215. According to the summons, all those who had been summoned had the right to suggest subjects for discussion and negotiation, and it was Innocent's clear aim to eradicate the abuses and transgressions that he saw amongst the Christian congregation and to reform their customs so that peace could be secured within Christendom and Christians could join together to re-conquer the Holy Land. One of the means to secure internal peace and man's good relations with God was to ensure that the administration of justice took place in such a way that it did not allow for abuse. Therefore, the attending bishops, who numbered more than 400, and the similar number of other prelates and secular representatives agreed to a number of procedural reforms that in the first instance were to govern the Church but which in the long term were also to influence secular administration of justice.

The changes to procedure were: firstly, the introduction of inquisitorial procedure at ecclesiastical courts (c. 8); secondly, the prohibition against clerics' participation in the so-called Divine Judgement and ordeals (c. 18); and thirdly, the introduction of written records of cases so that if an appeal was made it became possible to evaluate previously produced proof and objections (c. 38). Each of these new changes was the culmination of a long period of development that had started as early as the ninth century, but taken as a whole the three new rules must be characterised as a change of paradigm in ecclesiastical procedural law. They also presaged revolutionary changes in secular procedural law, where they either had been or would be fixed in local, regional or national collections of laws and customs.

The most important development in the new law of procedure was the final prohibition against clerical participation in cases that were decided by Divine Judgement such as the carrying of hot iron: 'means of proof' that previously had been seen to reveal the will of God. Since

the Church rejected the rationality and possibility of Divine Judgment as an expression of God's just sentence, it made it impossible for secular princes to include such means of proof in valid procedural law and therefore the secular sphere had to find alternative ways to determine the most serious legal disputes.

Generally, the need for new means of proof and new institutions to evaluate these proofs seems to have been answered by an increasing use of juries made up either of an *ad hoc* group of sworn men or a permanent jury, both of whom represented their local community. These juries, which in some instances can be found as early as the early twelfth century, had an ideological origin in the recently introduced inquisitorial procedure and were charged with finding the truth in any given case by weighing the evidence produced. In this way, the inquisitorial procedure took a decisive step away from the previously dominant form of procedure, i.e. accusatorial procedure in which one private party summoned another private party and the role of the judge or the court was simply to ensure that fixed proof had been produced so that an already decided sanction could be imposed upon the losing party.

Thus inquisitorial procedure took its starting-point with the Church's wish that legal procedure, at least in criminal matters, was to uncover the truth—the judge or the court was no longer just to acknowledge a decision made on the basis of fixed proof. The aim of inquisitorial procedure was thus not just to determine the accusation of one person against another, but to establish whether a crime had been committed at all. While accusatory procedure depended on the judge's or the court's acknowledgement that the two parties had produced their proofs, the new form of procedure within the Church meant that the judge now enjoyed the right to single-handedly initiate a case if he suspected a transgression against the law, and to question involved parties and witnesses in order to establish the truth. The development of the inquisitorial procedure thus coincided with a transfer of the burden of proof to the plaintiff, who was now to produce positive proof that the defendant was guilty, and an increased emphasis placed on those proofs that concerned the facts of the case and not the trustworthiness of parties. In other words, an increased weight was placed on personal testimony, on written documents, which were taken to be irrefutable proof, and on confession. Implicitly, this meant that the legal system increasingly distanced itself from the previously commonly used *compurgators*, who swore to the trustworthiness of the defendant rather than to the case itself.

It is in this connection that we must see the demand to record the proofs produced and the objections to them because this ensured that future generations could see evidence of the correct decisions in the case, which proofs had been produced by the parties and how the court had made its decision.

It has been my purpose in this investigation to uncover the extent to which the changes in the administration of justice decided by the Fourth Lateran Council influenced procedural law in Danish medieval provincial laws, which were written down while this development was occurring. A particular emphasis has been placed on the royally promulgated Law of Jylland in order to decide whether the development of procedural law and institutional administration of justice in the Danish collections of law—which so to speak culminated in the collection of law of 1241—can be seen as the expression of a uniquely Danish way to administer justice or as an adaptation of contemporary legal scholarship: a legal scholarship that was adapted into the framework of the already existing Danish administration of justice.

In order to determine this, I have analysed Danish provincial laws' normative expressions of the institutions of administration of justice as examples of how such a legal order was thought to be possible and the provincial laws' normative expressions of procedural law as examples of the ideals and principles that were to be the foundation of each province's legal order. As a consequence of these analyses I argue that the Law of Jylland reflects a qualitatively different stage of learned law than other Danish medieval collections of law and that therefore the Law of Jylland is fundamentally equal to contemporary learned law outside Denmark. This is the case when we analyse the clearly defined fixed institutions for the administration of justice that are indispensable for a properly functioning legal order and when we analyse the law of procedure that was based on a fundamental principle that cases should be heard in public, with a duty to carry them through, with well-defined terms for appearance and objections and an evaluation of presented or produced proofs. The great difference between the Law of Jylland and other contemporary collections of law is clearly not found in the substantial content of the law of procedure, but in the level of detail with which the law of procedure—which by and large corresponds to the Roman-canonical law of procedure—is implemented in individual collections of law. While the Roman-canonical procedure is present at a very sophisticated, technical and conceptual level in many other European kingdoms, especially in southern Europe, we do not

find it as explicitly or in such detail in the Law of Jylland. This fact leads to three more general considerations about how law was communicated and developed in thirteenth-century Denmark.

First of all, we must consider the fact that medieval secular law was to a large degree 'living law', which we must understand as a law under constant development. My analysis of Danish manuscripts and collections of law and the examples quoted of disagreement between individual redactions of law have demonstrated clearly that there was an extensive consensus to change or supplement the law found in these collections of law when this was necessary, based on experience and a will to guide development in a particular direction. Previous scholarship's interpretation that medieval secular law codes reflected a tradition that simply codified existing law can thus not be sustained, at least not when considering the developments of the thirteenth century.

This also means that although oral law is easy to adapt to changed circumstances or wishes, in contrast to changes in written law, which appear more clearly as changes so that the difference between old and new law is more explicit in written law, it does not mean that the development of law slowed down in the thirteenth and early fourteenth centuries. The material that I have investigated shows that this is the case, both when considering procedural law and the institutions of legal administration.

In some contexts, however, the development focused on developing and refining the institutions of legal administration. In a number of southern European collections of laws this was clearly a royal initiative, but in Denmark it appears to have been the result of an interaction between royal central power and regional magnates or local communities in individual provinces. In the case of the Law of Jylland, we see an increased emphasis on the power of the *ting* to reject decisions by jurors from the beginning of the fourteenth century and a more lenient law of procedure and sanctions in many respects than that found in the older redaction. This indicates that there was not a particularly large distance, at the level of the *landsting*, between royal central power and local or regional magnates in terms of their power politics and their attentiveness to new developments.

In practice, there was a general awareness that old texts were to be interpreted in the light of later changes and that therefore it is entirely acceptable that there should be textual variants in normative texts—legal texts were not the carriers of solutions to a concrete legal problem because these texts had to be interpreted with regard to their tradition, that is their relationship to custom, later legislation, and

decisions intended to create precedence. Sometimes this awareness is visible in the manuscripts and sometimes it is not.

Secondly, we must conclude that the legislation, which was most likely royally initiated in the thirteenth century, was strongly influenced by learned law, even in Denmark. This does not mean that the kings and their legal advisers simply transplanted legal rules or institutions as they were known in post-Classical Roman or contemporary canon law and transferred them into their own secular legal order. On the contrary, combining these new developments with a moral Christian ethic and its ideas about what was just, the thirteenth-century Roman-canon law delivered a number of institutional and procedural ideas and tools that allowed a secular prince to provide a legal order capable of living up to the ideals that had been formulated by learned law and which might even underpin royal rule. It was, so to speak, a tool box from which the prince and his advisers and supporters could take what they could use and, if necessary, adapt it to exactly fit those local conditions that were already in place.

Secular law was thus both shaped to fit existing frames and meet the law-givers' goals and to fit the particular learned tools that the law-givers possessed. These tools, which were admirably suited for their purpose in both northern and southern Europe, consisted of course of the large collections of Roman and canon law, which being written law were more suited for international distribution since these collections could be the means of communication over large distances and areas without changing their shape or content because of their increased study at universities. It is precisely the fact that the learned collections of law could function as communication media over large distances that means it can be difficult to identify particular legal centres or peripheries in thirteenth-century Europe, at least if we insist on studying the administration and those social groupings that were closely associated with the centralising royal powers.

If we look at conditions in the Danish kingdom, the situation is different in as far as the central power apparently 'relinquishing' or accepting that a part of the substantial private law or indeed the sentencing function was to be resident with the local population, which probably could not understand the technical finesses of procedural law or the newer learned principles concerning positive proof and majority decisions. Here the difference between a centralised, learned environment around the king and a conversely less learned environment locally may be more visible than differences between central powers.

Thirdly, it must be said that the possibility of introducing Roman-canonical procedural law and its legal concepts was not good in Denmark, even if it had been the king's wish to do so. A possible explanation for this can of course be that the Danish king was not powerful enough to introduce learned law without major confrontations. Such an explanation, however, is not enough to explain the difference we find between the open use of learned law found in southern Europe in comparison to its more subtle use in Denmark. It is more likely that this was because southern Europe already shared a linguistic and legal tradition that was not too far removed from the institutions that were being introduced. During Classical times in southern Europe, the Romans had ruled and, in the centuries between the collapse of the Roman Empire and the medieval royal collections of law in general, law had been based on the practice of law that was built on a simplified Roman law. Such a situation could of course not be found in Denmark.

It is with this in mind that we must interpret the lack of an open introduction of Roman-canonical law of procedure in Denmark. Without a legal tradition to support such an implementation and without a sufficient power base that could guarantee this kind of implementation, it was basically impossible for the Danish king and his legal advisers to introduce and make effective the learned law of procedure that was preferred and promoted by the Christian Church. My analysis of the Law of Jylland and the other Danish provincial laws has shown that by 1241 the king did have legal advisers who knew and understood the learned law of procedure, but it was not a knowledge that was immediately visible in the Danish provincial laws. The most basic principles and ideas of the learned administration of justice and the law of procedure were introduced into Danish law to make it more effective, but this was not done openly through the use of Latin legal terms and such like.

Before the Fourth Lateran Council, the Danish legal order was based on accusatory procedure, with its fixed proofs and its fundamental use of negative proof, which was particularly symbolised in its most rarified form through that most difficult of proofs, namely the carrying of hot iron. With the Council's final rejection of Divine Judgement, the frequently used carrying of hot irons was made obsolete and the Danes were now presented with a pressing procedural problem that demanded an answer. This came in the form of juries, which were fundamentally intended to replace negative proof with a

positive evaluation of proofs produced in a case, but in practice the old practice seems to have continued in some cases, i.e. that the law allowed a compurgation to determine matters.

As the learned law of procedure developed the principles of majority, subjective guilt, tighter time limits and a more extensive use of inquisitorial procedure, it became clear to the king and to the Church that the Danish administration of justice had to be made more effective in order to create a legal order that satisfied the moral-ethical aims of the Church, and which in addition provided the king with a role to play in the local administration of justice in that it was only him, at least formally, who could appoint jurors. From the standpoint of the central power there were three possibilities:

To introduce a law that openly introduced a new legal order based on learned law with the king as the uncontested giver of laws.

To abstain from attempting the implementation of learned law, which would mean losing the possibilities it provided to strengthen the king's position and to carry through the legal ideology of the Church.

Or to transform learned law's fundamental procedural principles so much that they would appear to be only minor adjustments of the existing administration of justice while in actual fact, for those learned in law, they were a revolutionary change of the fundamental principles behind the Danish administration of justice.

Following through the exalted position of the king in the prologue to the Law of Jylland, the latter avenue was followed, probably with an underlying idea that this collection of law, or at least its principles, was to be valid for the entire kingdom. Thus it is also very likely that the development of law in medieval Denmark happened primarily through the borrowings of Danish jurists from learned law when faced with a local problem of law which they could not solve based on the existing system of law. Such legal borrowings or 'transfers', the so-called 'legal transplants', were purely practical, voluntary and technical solutions of the dogmatic problem that had arisen. And by necessity this was implemented by juristic authorities against the background of the legal tradition in which they had grown up.

PART TWO

LEGAL PROCEDURE AND PRACTICE IN
LATE MEDIEVAL DENMARK

CHAPTER SEVEN

LEARNED TENDENCIES AND PRACTICAL CONSIDERATIONS

When the Western Church introduced inquisitorial procedure in 1215 it caused fundamental changes in the law of proof that had previously been used and promoted in Western Europe. *Firstly*, objective proof, which had previously decided cases by itself, was made obsolete and replaced by substantive proof, which was intended to decide whether a particular action had caused damage and, if this was the case, who had caused the damage. The aim was to find the truth in a matter, not 'just' to let the case of the plaintiff and the defendant's failure to provide proof of the opposite form a decision. *Secondly*, new institutions for the administration of law were introduced to evaluate these substantive proofs and thus establish truth based on an unbiased approach to the question of guilt. This was a necessary consequence of the desire to establish the truth. *Thirdly*, the burden of proof was now reversed and lay with the plaintiff. In other words, the defendant was now innocent until proven guilty. The purpose of these changes was partly to ensure that innocent people were not convicted solely because of the plaintiff's accusation and the defendant's unsuccessful proofs of innocence and partly because of considerations of efficiency since these changes meant that there would be fewer speculative accusations and attendant cases.

As mentioned in the first part of this study, this fundamental rethinking of particularly criminal procedure also affected the development of a similar change of paradigm in secular law in many countries, Denmark not least amongst them. However, this did not mean the end of the influence from the learned ecclesiastical jurisdiction because around the same time the contours of a pair of other far-reaching characteristics began to take shape within the ecclesiastical administration of justice, inspiring similar developments in secular law: a centralisation and its attendant imposition of a hierarchy of courts with its systems of appeal and a demand for more effective procedure.

Centralisation and the Imposition of a Hierarchy

The introduction of a legal hierarchy and appeals against previous sentences to a higher authority is seen from the beginning of the twelfth century in ecclesiastical jurisdiction. The idea that it should be possible to appeal sentences that were supposed to be final is related to the expansion of papal jurisdiction that established the papal court as the supreme decision-maker for the entire Church. This happened because of an increasingly presentation of legal problems to the pope from all over Europe. In the beginning the pope personally dealt with these cases, but from the mid-thirteenth century this became rarer, and when the papacy moved to Avignon at the start of the fourteenth century it became common for the pope to allow the case to be treated by papal auditors and decided by cardinals.¹ The new legal institution—*audientia sacri palatii*, also known as the *rota*—that gradually took form was officially instituted by Pope John XXII (r. 1316–1334) in 1331, whereupon it developed into a de facto supreme court within the Church with its attendant extensive bureaucracy.²

Among the rules that John XXII established by the bull *Ratio iuris* from 1331 was the requirement that sentences were not to be passed until the auditor responsible had consulted with his learned colleagues and that an auditor was disqualified from treating cases in which he, his relatives or other people with whom he had a relationship was a party. These ethical rules were extended to cover the advocates and proctors of the *rota* by Popes Benedict XII (r. 1335–1342) and Gregory XI (r. 1371–1378). In 1418 Pope Martin V (r. 1417–1431) added to the ethical requirements by formulating demands about the personal background, education, general habits and financial stability of auditors, notaries, advocates and proctors, and he also fixed salaries for the different members of the court. The auditors were to preside over the sentencing while notaries were to make sure that act books and registers containing decisions were kept so that the auditor, the parties' representatives—the proctors—and their advocates would all have full access to claims and proofs that had been produced in court.³ Written culture thus played a great role both formally and in practice, not least

¹ Brundage, *Medieval Canon Law*, pp. 123–126.

² Ingesman, *Provisioner og processer*, pp. 86–91.

³ Ingesman, *Provisioner og processer*, pp. 91–108.

because the ecclesiastical courts were populated by men trained in canon law who were accustomed and trained to take matters down in writing in their work as advocates, proctors and notaries.⁴ This did not mean, however, that there was not a certain degree of scepticism about written documentation when weighed against oral evidence since the personnel of the court were aware of the possibility that forged documents could decide a case unjustly.⁵

While there seems to have been considerable scepticism about the use of written documents in secular connections,⁶ European legal systems quickly adopted the idea of a hierarchy of courts and the possibility of appeal. The centralisation that is seen in the Church in the period after the introduction of inquisitorial procedure had an equivalent in principalities and kingdoms and this became a factor in the introduction and development of courts of appeal and for the development of procedure. This was now a more 'top-down' movement so that the development of procedure and the form it took, which was initiated centrally, spread to large parts of local jurisdiction.

In England this development took place around the establishment of the King's Bench at Westminster and through a system of royally appointed itinerant judges who, already from the end of the twelfth century, began to convene courts and be active across virtually the entire kingdom. Thereafter English kings claimed precedence over noble jurisdictions with varying but increasing degrees of success, not least through the means of increased legislative activity from the middle of the thirteenth century.⁷ While there was more legislative activity on the continent, the relative paucity of English legislation meant that English procedure became heavily influenced by custom as it was practised at the courts. Indeed, there was so little uniformity in the material law that common-law tradition gives the impression of being procedural law with traces of substantive law rather than vice versa.⁸

⁴ Brundage, *Medieval Canon Law*, pp. 135–139.

⁵ Brundage, *Medieval Canon Law*, pp. 132–133, referring amongst others to X 2.22.

⁶ See Michael T. Clanchy, *From Memory to Written Record. England 1066–1307* (Oxford, 2nd ed., 1993), pp. 260–263, 272–278, 295–299; Gelting, "Circumstantial Evidence".

⁷ Brand, *The Origins of the English Legal Profession*, pp. 14–32; Paul Brand, *Kings, Barons and Justices. The Making and Enforcement of Legislation in Thirteenth-Century England* (Cambridge, 2003).

⁸ For a discussion of the concepts of law and custom in English law see Paul Brand, "Law and Custom in the English Thirteenth Century Common Law", eds.

One of the most characteristic features of the English system was the so-called writs, which were royal orders to the local sheriff instructing him to perform certain legal steps against named defendants. However, it was the plaintiff who decided which kind of case he wanted to initiate because he had to request that the central administration approach the sheriff. There were a number of fixed possibilities for litigation and writs that were applicable to specific disputes and during the twelfth and thirteenth centuries more were added as a reaction to an increasing social, economic and legal complexity. The English system was thus primarily developed against a background of practice, for which reason the use of legal practitioners, a separate legal profession, became common, particularly from the second half of the thirteenth century.⁹ Despite the degree of learned law that infiltrated this system, the English system remained practice oriented because of its limited use of legislation. Royally appointed judges, who were increasingly active locally, became the people who delivered the final summary of the case to the local jury.¹⁰ While it seems to have been the role of the jury to comprehend and decide cases, the increased presence of a royally appointed judge led to an increased degree of legal expertise and objectivity in the final decisions, but it did not mean that procedure as such changed fundamentally—it was still up to the two parties to prove their cases and convince nominated jury members, who in return had the task of establishing the truth of a case.¹¹

In contrast to the English legal system, which did not know appeals because of its horizontal structure in which in principle even the King's Bench in Westminster was open to every subject as a court of first instance,¹² France took a different path. From the middle of the thirteenth century the French *Parlement*, in its role as a court of appeal, became the model for the procedure implemented both in the

Per Andersen and Mia Münster-Swendsen, *Custom. The Development and Use of a Legal Concept in the Middle Ages. Proceedings of the Fifth Carlsberg Conference on Medieval Legal History 2008* (Copenhagen, 2009), pp. 17–31.

⁹ R.C. van Caenegem, "History of European Civil Procedure", *International Encyclopedia of Comparative Law* XVI (Leiden, 1973), ch. 2, pp. 25–28; Caenegem, *The Birth of the English Common Law*, pp. 29–61.

¹⁰ van Caenegem, "History of European Civil Procedure", p. 14.

¹¹ T.F.T. Plucknett, *Legislation of Edward I* (Oxford, 1949), pp. 106–138; van Caenegem, *The Birth of the English Common Law*, pp. 62–84.

¹² van Caenegem, "History of European Civil Procedure", p. 30.

northern *pays de droit coutimer* and the southern *pay de droit écrit*.¹³ However, it never became as established or centralised as the English system, both because the area over which the French king claimed sovereignty was considerably larger than the English, which made effective control very difficult, and because the political-social structures in France were considerably different to the English. France consisted of largely autonomous principalities, for which reason the king mainly concentrated jurisdiction in areas that were directly under his control and focused on establishing compromise in order not to disturb a fragile balance of power.¹⁴ For this reason, a French judge often took a less active role than an English judge.¹⁵ The form of procedure in royal jurisdictions was inspired by canon law and inquisitorial procedure. However, the rich tradition of Roman law and the need for French kings to mark themselves out against the papacy led to a late-medieval blossoming of alternative forms of learned procedure. These may have used written procedure in early phases when permission was being granted to initiate a case, but the presentation of the case at court mainly took place orally between the parties themselves—unless the judge demanded differently—or if the parties were represented by advocates, as was the case at the *Parlement* in Paris but not throughout the country.¹⁶

The same pattern is found in the cities of Flanders and the Low Countries in which new methods of proof such as documents and witnesses were introduced in the thirteenth century while the use of notaries did not become common until the sixteenth century. The cities of Flanders also kept the institution of compurgation and a fundamentally oral procedure. When the city council of Lille tried to introduce written procedure in 1343 it was met with strong opposition from the city inhabitants. Therefore it was only at the higher courts based around princes that learned procedural law (and the use of trained jurists) established itself while local courts employed a mixture of the older oral procedure and new means of proof. From the end of the

¹³ Concerning this transformation in *pays de droit coutimer*, see Esther Cohen, *The Crossroads of Justice. Law and Culture in Late Medieval France* (Leiden, 1993), pp. 54–73.

¹⁴ John Hudson, *The Formation of the English Common Law* (London and New York, 1996), pp. 237–239; van Caenegem, *The Birth of the English Common Law*, pp. 85–110.

¹⁵ van Caenegem, “History of European Civil Procedure”, p. 14.

¹⁶ van Caenegem, “History of European Civil Procedure”, p. 32.

fourteenth century it is possible to see an influence from French procedure, primarily in the use of a tribunal that met before the case to interrogate witnesses and take down their depositions in writing.¹⁷

The development of central powers and the establishment of a hierarchy in the legal system cannot be separated. However, that is not to say that a strong central power was a necessary precondition for initiating a process of differentiation in the legal system. In many cases it was the other way around, namely that the establishment of a central court helped to establish a central power. The Holy Roman Empire seems to be an example that demonstrates that establishing a central court of appeal assisted rather than resulted from the development of a strong central power. German kings and princes may have established central courts in the fourteenth and fifteenth centuries, but the empire did not establish its control over jurisdictions until the establishment of the personal court of the emperor, the *Reichskammergericht*, was officially recognised in 1471. This court provided everywhere in the empire the possibility of appealing local decisions to a higher court,¹⁸ a possibility that was increasingly utilised in the sixteenth century.¹⁹ This court also initiated a streamlining of procedural law to ensure that all courts decided cases using the same methods and the same criteria. Until the success of this system, German procedure had been based on the rules found in law collections from the High Middle Ages such as the *Sachsenspiegel* and the *Swabenspiegel* whose procedure was highly formulaic and combined oral presentations with objective proof. As in the Low Countries, Germany did not initiate or conclude a process of establishing a hierarchy until political authorities found the time and extra energy needed to initiate such a process, and this process contained a reception of the learned law and its methods and legal powers. This was also the reason that such an adaptation was only implemented slowly because Germany did not share the same degree of political unity and centralisation as the Low Countries, and for this

¹⁷ van Caenegem, "History of European Civil Procedure", pp. 45–47.

¹⁸ For a general introduction, see A. Laufs, "Reichskammergericht", *HdR* IV, cols. 655–662.

¹⁹ Kathrin Dirr and Torsten Joecker, "Die Inanspruchnahme des Reichskammergerichts durch die Reichsstädte", eds. Anette Baumann, Peter Oestmann, Stephan Wendehorst and Siegfried Westphal, *Prozesspraxis im Alten Reich* (Böhlau, Köln, Weimar and Wien, 2005), pp. 119–136.

reason the introduction of learned law could almost be characterised as a revolution in the sixteenth century.²⁰

The same situation prevailed in Italy, especially southern Italy where royal power was stronger than in northern Italy. Emperor Frederick II's Constitutions of Melfi from 1231, which formed the basic foundation of his Sicilian kingdom, applied a law of procedure that was largely identical to contemporary Roman-canonical procedure.²¹ Learned procedural law also influenced northern Italian city-states by introducing fundamental elements such as single judges, written interventions and documents as proof, publicly available court books and the introduction of a system of appeal. However, the more cumbersome and delaying parts of the procedure were often left out since a slow procedure could not meet the demands for speed required by trade and desired by citizens (it is also very possible that such developments inspired the Church to introduce summary procedure in cases where the outcome appeared obvious). Several city-states also waved the requirement that the parties should swear an oath of calumny since critics found it formalistic and, in reality, without meaning.²² The development in northern Italy was not unequivocal because while some localities were sceptical about learned law,²³ other cities chose to use Roman law to reform old and outdated customs.²⁴

We do not observe the same scepticism in the strong kingdoms on the Iberian Peninsula, which had shared a strong Roman law tradition since the later days of the empire.²⁵ They did not exhibit the same

²⁰ van Caenegem, "History of European Civil Procedure", pp. 42–43.

²¹ For an analysis of this and further literature, see the unpublished part of Per Andersen, *Lærd ret og verdslig lovgivning. Om retlig kommunikation og udvikling i det 13. århundrede* (unpublished PhD thesis, Aarhus University, 2005), pp. 135–187.

²² van Caenegem, "History of European Civil Procedure", pp. 337–339.

²³ Mario Ascheri, "Private People among Law and Politics in a Tuscan Town. Siena from the early 13th Century to the early 14th Century", eds. Per Andersen, Mia Münster-Swendsen and Helle Vogt, *Law and Private Life in the Middle Ages. Proceedings of the Seventh Carlsberg Conference on Medieval Legal History 2009* (Copenhagen, 2011), pp. 229–243.

²⁴ Emanuele Conte, "Roman Law vs Custom in a Changing Society: Italy in the Twelfth and Thirteenth Centuries", eds. Per Andersen and Mia Münster-Swendsen, *Custom. The Development and Use of a Legal Concept in the Middle Ages. Proceedings of the Fifth Carlsberg Conference on Medieval Legal History 2008* (Copenhagen, 2009), pp. 33–49.

²⁵ For a power-political analysis of this and further literature, see Andersen, *Rex imperator in regno suo*, pp. 100–110, 119–129; van Caenegem, "History of European Civil Procedure", pp. 39–42.



Map 2 Jurisdictions in Medieval Denmark.

resistance to learned law that was found in the city-states of northern Italy. Before the eleventh century Christian regions had utilised the so-called *pesquisa*, which consisted of a written interrogation of a group of local inhabitants concerning local matters, performed by representatives of the royal administration.²⁶ For this reason Iberian society was to a certain degree already used to a certain level of literacy in procedural matters since several local kings began to introduce parts or indeed all of the entire corpus of rules of learned procedure in the thirteenth century, for example by means of the royally initiated Aragon Vidal Mayor from 1247, which successfully established a hierarchy of courts (although it is questionable whether this royal law ever was effected or not).²⁷

Thus, there seems to have been a clear connection between the centralisation of power and the development of a hierarchical system of appeal possibly initiated by practitioners of learned law. In areas where there was a strong princely or royal power—in southern Italy, the Iberian Peninsula and in the French royal domains—we find that there was a development of (or at least a wish for developing) a court hierarchy and a use of learned and literate law, while in areas with weak central authorities—the city-states of northern Italy, the cities of Flanders and the pre-Reformation German area—we find a more mixed picture in which parts of the learned procedural law was implemented, if it was possible or made operational sense, while older customs and institutions were preserved in other contexts, in some cases possibly as a reaction to centralising tendencies. In this connection, England showed a slight difference in that it did not use legislation to guide developments to the same extent as princes on the continent.

The Demand for Efficiency—Procedure in the Later Middle Ages

Even before the year 1300 the Church realised that there was a need for a faster procedure because of the slowness that was a consequence of the way in which both civil and criminal inquisitorial procedure had developed. Attempts had been made to make the legal system more efficient since the end of the twelfth century, but from the beginning

²⁶ van Caenegem, "History of European Civil Procedure", p. 39.

²⁷ For an analysis of this and further literature, see Andersen, *Lærd ret og verdslig lovgivning* (PhD thesis), pp. 189–243.

of the fourteenth century summary procedure was allowed as one type of procedure within ecclesiastical jurisdiction.²⁸ Summary procedure was characterised by short terms and limited possibilities to object to a case or produce proofs. In this way, the often slow and cumbersome accusatory process that according to ecclesiastical lawyers often meant that a dispute could drag on for too long was speeded up.²⁹ One of the means of increasing efficiency was an increased emphasis on confession from the defendant or the introduction of a possibility to characterise a particular crime as notorious, that is that it was so well known that the defendant could be sentenced based on the proofs alone without further process. Although this provided many opportunities for an abuse of power, legal scholars warned strongly against such abuses.³⁰

These were the kind of ideas that allowed the deviation, both in real and in formal terms, from the canon law rule that two witnesses were needed for a full proof in return for the acceptance that the defendant could be judged solely on circumstantial evidence if the judge was convinced that he was guilty.³¹ These had also been the thoughts behind the development of inquisitorial procedure: to make procedure more efficient and to find truth at the same time, but even this kind of procedure had proven itself cumbersome and heavy after a century.

To assist in finding the truth judicial torture was soon introduced as a method of interrogation. The acceptability of torture was due to the fact that confession became increasingly important as a means of proof. Confession may have been known from Roman law, but the medieval discussion of guilt amongst learned theologians and canonists meant that confession gained an increased importance since confessing to sin was the first step towards exculpation of sin. In Roman-canon procedural law there were henceforth three means of proof: two witnesses

²⁸ Brundage, *Medieval Canon Law*, pp. 139–140.

²⁹ See Helmholz, “Undue Delay in the English Ecclesiastical Courts”, pp. 131–139; Knut Wolfgang Nörr, “Rechtsgeschichtliche Apostolien zur Clementine Saepe”, ed. C.H. van Rhee, *The Law’s Delay. Essays on Undue Delay in Civil Litigation* (Mortsel, 2004), pp. 203–215. On summary procedure, see Daniela Müller, “Die Entstehung des summarischen Verfahrens im Strafrecht des Mittelalters”, Hans Schlosser & Dietmar Willoweit (Hrsg.), *Neue Wege strafrechtsgeschichtlicher Forschung* (Konflikt, Verbrechen und Sanktion in der Gesellschaft Alteuropas. Symposien und Synthesen 2) (Köln, Weimar and Wien, 1999), pp. 299–311.

³⁰ See Inger, *Das Geständnis in der schwedischen Prozessrechtsgeschichte*, pp. 17–46; Langbein, *Torture and the Law of Proof*, pp. 4–8. Brundage, *Medieval Canon Law*, pp. 144–147.

³¹ Fraher, “Conviction According to Conscience”.

to the transgression; the confession of the defendant; and *indicia*, i.e. is circumstantial evidence that the person in question was in fact guilty. The problem with the latter was that it was not, in and of itself, as full a proof as the two former and therefore it was desirable to obtain a confession, and thus torture was introduced. The most common prerequisite for moving on to torture within those legal systems that permitted its use was that there had to be such weighty circumstantial evidence that the court had been convinced of the defendant's culpability. In other words, if there was a 'half-proof' such as an eye witness or substantive proofs of a certain quality against the defendant. In addition, it was preferable if the defendant produced information concerning his crime under torture that only a guilty man could know because this proved additional evidence of his actual guilt.³²

Judicial torture was a concept developed by learned jurists within the framework of ecclesiastical procedural law, and it is apparent that it was not introduced anywhere in medieval Europe without strong inspiration from Roman-canon law directly or indirectly, for example because of the prosecution of heretics.³³ In addition, it appears that a significant degree of learning behind its implementation was necessary for the first mention of it is known from north Italian city-states around the 1230s, in southern France around the 1250s and on the Iberian Peninsula a decade later while it was not commonly accepted in Flanders until the first half of the fourteenth century.³⁴ Torture was subsequently introduced in France and Lithuania and, after the Reformation, even in Sweden, Poland, Russia and the Low Countries.³⁵

³² See Langbein, *Torture and the Law of Proof*, pp. 4–8, 12–16.

³³ Langbein, *Torture and the Law of Proof*; Winfried Trusen, "Strafprozess und Rezeption: Zu den Entwicklungen in Spätmittelalter und der Grundlagen der Carolina", eds. Peter Landau and Friedrich Schroeder, *Strafrecht, Strafprozessrecht und Rezeption. Grundlagen, Entwicklung und Wirkung der Constitutio Criminalis Carolina* (Frankfurt a.M., 1984), pp. 29–118, esp. 45–59.

³⁴ Trusen, "Strafprozess und Rezeption", pp. 42–45.

³⁵ Heikki Pihlajamäki, "The Painful Question: The Fate of Judicial Torture in Early Modern Sweden", *Law and History Review* 25 (2007), pp. 557–592; John H. Langbein, "The Constitutio Criminalis Carolina in Comparative Perspective: An Anglo-American View", eds. Peter Landau and Friedrich-Christian Schroeder, *Strafrecht, Strafprozess und Rezeption. Grundlagen, Entwicklung und Wirkung der Constitutio Criminalis Carolina* (Frankfurt a.M., 1984), pp. 215–225; Olav Moorman van Kappen, "Die Kriminalordnungen Philipps II. für die Niederlande im Vergleich zur Carolina", eds. Peter Landau and Friedrich-Christian Schroeder, *Strafrecht, Strafprozess und Rezeption. Grundlagen, Entwicklung und Wirkung der Constitutio Criminalis Carolina* (Frankfurt a.M., 1984), pp. 227–252.

According to John H. Langbein the reason why judicial torture was never systematically applied in England was the absence in that country of a sufficient professional bureaucracy—the use of torture required knowledge and insight that was not available in the English system, which was constructed around unpaid amateur laypeople.³⁶ We find a good example of Langbein's thesis in the German area where judicial torture is mentioned around 1300 in the learned literature,³⁷ while it appeared a little later in secular law among the city scribes who were often the people who extended knowledge and use of learned law.³⁸ Around this time, individual elements of inquisitorial procedure that were the prerequisites for the introduction of torture had already found their way into the statutes and had become an element of royal and imperial privileges. It was also in the royal-imperial jurisdiction that torture was used. Thus public officials presided over torture.³⁹

This did not mean that judicial torture was utilised without reflections on its effects and efficacy, and whether the use of torture introduced new elements of uncertainty. On the contrary; the medieval inquisitorial procedure focused on investigating substantive truth, but the variation on that theme that became dominant in the German areas under royal and imperial jurisdiction relegated the investigative element to the last public court meeting, after which the judge and his assistants would decide on the prescribed punishment in the matter that was under investigation.⁴⁰ In contrast to this closely regulated part of procedure, the early stages, which amongst others were

³⁶ Langbein, *Torture and the Law of Proof*, pp. 137–138. Langbein believes that this demonstrates that the development of procedure in England was different in kind from the continental development, which point of view has received support from Elizabeth Hanson, "Torture and Truth in Renaissance England" *Representations* 34 (1991), pp. 53–84, and James Heath, *Torture and English Law: An Administrative and Legal History from the Plantagenets to the Stuarts* (Westport, 1982). Pihlajamäki, "The Painful Question", has shown that this also fits the development and organisation of the Swedish legal system in the sixteenth century, for which reason it is doubtful that England was as different as Langbein suggested. Also compare Mathias Schmoeckel, *Humanität und Staatsraison. Die Abschaffung der Folter in Europa und die Entwicklung des gemeinen Strafprozess- und Beweisrechts seit dem hohen Mittelalter* (Köln, 2000).

³⁷ Trusen, "Strafprozess und Rezeption", pp. 33–42.

³⁸ Trusen, "Strafprozess und Rezeption", pp. 59–69.

³⁹ Trusen, "Strafprozess und Rezeption", pp. 69–79.

⁴⁰ Gerd Kleinheyer, "Tradition und Reform in der Constitutio Criminalis Carolina", eds. Peter Landau and Friedrich-Christian Schroeder, *Strafrecht, Strafprozess und Rezeption. Grundlagen, Entwicklung und Wirkung der Constitutio Criminalis Carolina* (Frankfurt a.M., 1984), pp. 7–27, esp. 10–14.

to decide whether there was any foundation for initiating a case, was more haphazard. It was not until the end of the sixteenth century that learned Germans made an effort to standardise these earlier stages, which resulted in the public imperial collection of law, the *Constitutio Criminalis Carolina*.⁴¹ It was a meeting of a Reichstag in 1497–1498 that decided that reform of criminal procedure was needed and that this was to be valid for the entire Holy Roman Empire. Thus, the Carolina only dealt with crimes serious enough to carry a physical punishment, and in particular with the procedure that determined such cases. The sources for this new law were various local or regional statutes dating from the 1480s onwards⁴² and the strict implementation of criminal law that the Carolina is particularly known for depended to a large extent on its association of serious transgressions against the law with public interest in preventing such transgressions—the fact that the public (and the emperor) were also inconvenienced by serious transgressions against the law resulted in a clearly more severe penal code. However, the Carolina also provided the outer limits for when the most serious punishments could be utilised and thus, though it was more severe, provided a stronger protection of individual rights and the standardisation of law.⁴³

It is not surprising that the Carolina also contained rules for the use of torture. It is more surprising, however, to study the rules because the Carolina did not allow torture to be performed in public—as part of public procedure—since it argued that it took too long for the defendant's resistance to break down and therefore torture was moved forward to the preparatory investigations. In return, it provided clear rules that protected the rights of the defendant by establishing in what circumstances torture could be used, namely when a suspicion was sustained by witnesses or comparable weighty evidence. However, it also stated that confessions that were produced under torture were not admissible. In other words, according to Carolina, a confession could only be taken as evidence if it had been produced after torture had ceased and in addition the Carolina insisted that the defendant should have two days to consider his confession, after which he would

⁴¹ Trusen, "Strafprozess und Rezeption", pp. 79–86, 90–118.

⁴² Kleinheyder, "Tradition und Reform in der *Constitutio Criminalis Carolina*", pp. 14–18.

⁴³ Kleinheyder, "Tradition und Reform in der *Constitutio Criminalis Carolina*", pp. 25–26.

be given the opportunity to either confirm or reject it.⁴⁴ Thus the Carolina is an example of the scepticism about torture that, at a later date, meant the rejection of torture as a means of proof.

I have already pointed out above that centralisation of real power and of jurisdiction, as we see it displayed in many parts of Europe in the fourteenth and fifteenth centuries, made it possible for two characteristics to develop in late medieval procedural law: a system of appeal and a streamlining of procedural law, which was helped along by a more generous use of inquisitorial procedure in secular jurisdictions, the use of torture and the introduction of time-saving elements such as the possibility of immediately announcing decisions in cases where guilt was apparent. A common trait in all these phenomena and characteristics was that they arose from or were modelled on the discussion in learned law that often first took place in the Church. While I shall allow the investigation of whether we find such phenomena in Danish procedural law wait until later in this book when discussing individual geographical jurisdictions, I shall spend the rest of this chapter partly discussing whether late-medieval Denmark had such a degree of knowledge of learned law that it could provide an inspiration for secular procedural law and partly uncovering the extent to which there was an increased hierarchy of power structures in late-medieval Denmark since these will reflect the possibilities of developing hierarchical systems of courts and appeals.

A Learned Legal Environment in Late-Medieval Denmark?

The traditional view of late-medieval legal science in Denmark has been that it was largely present through its absence. No rule without exceptions, however, and in this case the one exception was the Bishop of Viborg, Knud Mikkelsen, who was trained in both Roman and canon law.⁴⁵

Knud Mikkelsen studied at the University of Rostock, from which he received a bachelor's degree in 1421. He then journeyed to Erfurt

⁴⁴ Kleinheyer, "Tradition und Reform in der Constitutio Criminalis Carolina", pp. 21–25.

⁴⁵ See Stig Iuul, "Jyske Lov i Retslitteraturen indtil 1683", ed. Erik Reitzel-Nielsen, *Med Lov skal Land bygges* (Copenhagen, 1941), pp. 121–56, esp. 129–145, and Holberg, *Dansk og fremmed Ret*, pp. 3–22.

where he was granted a Masters degree in 1425 and after that he probably continued to study law there because in 1434–1435 he was the Rector of the University of Erfurt and sometime after that he received his degree as a doctor *iuris utriusque*. He then returned to Denmark, where he served the king on diplomatic missions on several occasions before being appointed bishop of Viborg in Jylland and thus was granted a seat at the royal court of law. It was undoubtedly in this connection that he learned about the customary practice of this court, for he used these liberally as examples in the glosses to the Law of Jylland that has secured his subsequent fame.⁴⁶ Among the sources of the glosses we find Gratian's Decretum, the Liber Extra, Liber Sextus and the Clementinae and what appears to be Huguccio's Summa of Gratian and his commentary on the Liber Extra. In other words, Knud Mikkelsen used all the most important works of canon law that were contemporary with the Law of Jylland and the collections of law that had been added since its composition.⁴⁷ The purpose behind his Latin glosses to a Latin version of the Law of Jylland was most likely to spread knowledge of the Law of Jylland in the learned environment outside the kingdom of Denmark because Mikkelsen primarily investigated those instances when the Law of Jylland agreed with imperial and canon law. However, he himself wrote that such a comparison had been performed because it would promote the observance of Danish law—that is there must also have been an interior aim to demonstrate that the Law of Jylland's rules were based on ancient authorities and to make them more understandable by referring to Roman and canon law. In addition, and perhaps more fundamentally, these Latin glosses were added to a Latin version of the law at a time when legislation was primarily composed in Danish.⁴⁸

One purpose does not exclude the other, and Knud Mikkelsen's efforts are evidence of at least some level of scientific approach to law in late-medieval Denmark. Per Ingesman has convincingly argued for a growing learned environment in canon law in the fifteenth and early sixteenth centuries and quotes a number of clear indicators: a growing number of students and candidates at foreign universities; the establishment of the University of Copenhagen in 1479 (based on the

⁴⁶ Iuul, "Jyske Lov i Retslitteraturen indtil 1683", pp. 129–132.

⁴⁷ Iuul, "Jyske Lov i Retslitteraturen indtil 1683", pp. 134–136.

⁴⁸ Iuul, "Jyske Lov i Retslitteraturen indtil 1683", pp. 137–140.

model of Cologne); a good stock of canon law literature in cathedral libraries and individual private collections that we know about from book lists; and the composition of the glosses and a translation of a Summa concerning canon law procedure, possibly also composed by Knud Mikkelsen.⁴⁹

That there was a renewed interest in and discussion, or at least considerations, of the foundations of law and its development before the end of the fifteenth century is clear from the activity that we already see in the fourteenth century. *Firstly*, we find Thord's Articles, which we must conclude on the basis of manuscript transmission and translations of the original Latin text received its greatest dissemination in the fifteenth century.⁵⁰ *Secondly*, there seems to have been an attempt to re-establish the foundations of law after the political disturbances of the fourteenth century because this period saw a concerted effort to identify old law texts that could be given new authority: the revitalisation that took place in the first half of the fifteenth century of the original text of The Book on Inheritance and Heinous Crimes as an addition to the Law of Skåne is a clear witness to this.⁵¹ The same holds true for the unusual manuscript AM 12, 8°, which contains many unique and very rare texts (and which, it has been suggested, was collected by Knud Mikkelsen).⁵² *Finally*, this period saw the sporadic introduction of collections of important sentences from the royal court of law in private collections (for more on this, see below).

If we are to evaluate whether there was a learned legal environment in late-medieval Denmark the conclusion must be in the affirmative. However, our few sources suggest that this environment may have included only a few individuals, that there was probably not legal science, neither in a contemporary or a modern sense, and it was probably not a particularly active environment in terms of its contribution to learning. However, it did exist in the same manner as the environment that had provided the foundations for the redesign of Danish procedural law in the thirteenth century.

⁴⁹ Per Ingesman, "A Canon Law Culture in Late Medieval Denmark?", ed. Mia Korpiola, *Nordic Perspectives on Medieval Canon Law* (Publications of Matthias Calonius Society 2) (Saarijärvi, 1999), pp. 65–78.

⁵⁰ See DGL IV (Tillæg), pp. XXV–XXIX.

⁵¹ See DGL VII, pp. XXXVII, XLIV–XLVIII.

⁵² Juul, "Jyske Lov i Retslitteraturen indtil 1683", pp. 132–133. Compare DGL IV, pp. I–VI.

The Danish Legal System in the Later Middle Ages

As we learned in previous chapters, the Danish legal system did not originally consist of a hierarchy of courts in which a case could be appealed from a lower court to a higher court, from the *herreds-* to the *landsting*. The system was horizontal so that all *ting* could be courts of first instance, depending on the nature of the transgression. While most cases were probably conducted and decided by the nearest *ting*, the *herredsting*, the *landsting* usually functioned as a kind of second-instance court in unusual cases, namely when the defendant did not appear before the *herredsting* or did not comply with a sentence. In such cases, it was possible to conduct the case once more at the *landsting*. A sentence that had been passed was thus not appealed, meaning that another court scrutinised the evaluation of a case in a lower court; instead a case that was heard by the *landsting* as a second instance was to be conducted as if it was a new case. Thus the *herreds-* and the *landsting* were equal courts whose common aim was to guarantee that a sentence was passed and executed—and the power wielded by the magnates who were present at the *landsting* probably put extra pressure on the convicted person to abide by the decision of the court. In addition, a sentence of outlawry passed by the *landsting* covered a wider geographical area than a sentence passed by the *herredsting*.⁵³

The beginning of the thirteenth century saw the introduction of another institution for the administration of justice to challenge the *herreds-* and the *landsting* (and perhaps also the *birketing*, for already at this time *birke* did exist—we know this because *birke* are mentioned in the sources although *birketing* are not).⁵⁴ This is revealed in the Law of Skåne and the older edition of Valdemar's Law for Sjælland in which we learn that the possibility was available to initiate proceedings before the king instead of the *ting* in several kinds of dispute over public land. The same was provided, but in less detail, in a single chapter of the Town Law of Schleswig, which like in the Law of Skåne and the

⁵³ Jørgensen, *Dansk Retshistorie*, pp. 240–241.

⁵⁴ Concerning this, see Henrik Lerdam, “Birkeret og birkepatroner i dansk senmiddelalder”, eds. Agnes S. Arnórsdóttir, Per Ingesman and Bjørn Poulsen, *Konge, kirke og samfund. De to øvrighedsmagter i dansk senmiddelalder* (Aarhus, 2007), pp. 271–299.

older edition of Valdemar's Law for Sjælland, originated in the first decades of the thirteenth century.⁵⁵

It is likely that this third institution, which was originally on the same level as the *herreds-* and the *landsting*, was more ancient than the two provincial laws and the Town Law for Schleswig and that the king had held the authority to pass sentence in certain kinds of cases since the last quarter of the twelfth century, a period of consolidation for the Valdemar dynasty. However, the traces of this activity are so faint that it is difficult to reach firm conclusions about it.⁵⁶ On the other hand, royal sentencing is much more visible in the thirteenth century. It is not a trend found in sentences—for this kind of source is only available in numbers in the fourteenth and fifteenth centuries—but there are traces of evidence that Danish kings in the thirteenth century worked to tip the balance of the horizontal system of courts in their favour, probably intending to encourage more business in the royal *ting* to provide more glory and authority for the king and to increase his income from fines.

The first trace of such attempts to influence the balance between the horizontal courts is found in the Abel-Christopher Decree around 1250 (which was, as already mentioned above, probably the draft for a law for the entire kingdom that was never passed).⁵⁷ The Abel-Christopher Decree mentions the possibility that the winning party in a case could call upon the king to execute a sentence passed by a local *ting* or, through the use of so-called 'king's letters', force the losing party to conform to the decision of the *ting* within three letters and thus fifteen, ten or five days.⁵⁸ These provisions were extended in the

⁵⁵ SkL 67, 69 and 82 with ÆR 191 and 193 and Slesvig Stadsret (the Town Law of Schleswig), § 56, see *Danmarks gamle købstadslovgivning*, 4 vol., ed. Erik Kroman (Copenhagen, 1951–1961) [hereafter DGK], in this case DGK I. For the dating of Slesvig Stadsret, see Jørgensen, *Dansk Retshistorie*, pp. 105–107. Jørgensen, *Dansk Retshistorie*, p. 518, mentions several examples from both provincial laws, but since some of these are drawn from the additions to SkL, they are difficult to date, see Andersen, *Lærd ret og verdslig lovgivning*, pp. 97–101, which is the reason why I disregard them here. The same is true for the references to Skånske Birkeret (the Peculiar Law of Skåne), in this connection § 35, see Kirsten Berth Paulsen, "Den skånske birkeret", *Scandia* 44 (1978), pp. 25–57.

⁵⁶ DD 1:3:103 from 1182 seems to be a good example of this.

⁵⁷ For a discussion of and references to previous literature, see Andersen, *Rex imperator in regno suo*, pp. 111–117, which follows Riis, *Les institutions politiques centrales*, pp. 55–59.

⁵⁸ The different versions of this are published in DRL 1, and here I am referring to 1:7, § 13, and 1:8, § 4.

håndfæstning of Eric V Klipping dating from 1282, which formed the basis for the procedure of 'king's letters' until the beginning of the sixteenth century when new rules concerning these appeared.⁵⁹

The king's letters were often designated 'reminding' letters since their purpose was to remind the recipient about an ongoing case that he had apparently forgotten or which he consciously tried to drag out by his absence or by ignoring the sentence. In cases involving property, i.e. mainly land, a practice had developed that allowed the defendant to receive several letters of summons demanding his conformity with the law,⁶⁰ but if he still refused to meet the demands of the court it would have been impossible for the plaintiff or successful party to do anything unless he had the power to enforce his rights. It is against this background that the issue of king's letters started.

In 1282, a first letter was intended to ensure that the losing party or the defendant was to conform to the court's demands within fifteen days. Subsequent letters, should they be necessary, diminished the timeframe to ten and then five days and the fourth letter demanded action at once and was therefore known as the 'straksbrev' ('the at-once letter'). This letter was publicly read out at the *ting*, which by the end of the thirteenth century usually met every week. Thus the whole procedure of king's letters would stretch over one month, the same timeframe that the Church imposed in connection with excommunication.⁶¹ Soon after this, the successful party could be granted an 'indførselsbrev' ('instalment letter'), which made it possible to execute the sentence with force and for the winning party to be granted possession of the estates with the help of some officials designated by the royal appointed *lensmand* (these officials were known as *ridemænd* (riding men) because they had to be mobile enough to reach the furthest reaches of the *len*). When the successful party had thus seized the estates, he received a 'stadfæstelsesbrev' ('letter of confirmation') for his ownership; this letter, however, contained the proviso that the case might be re-initiated if new evidence was to appear and that, as a consequence, the judgement could be overturned. The procedure of the king's letters was thus intended to settle the dispute and to allow

⁵⁹ See Lerdam, *Kongen og tinget*, pp. 38–39.

⁶⁰ See for example DD 2:9:56 and 57.

⁶¹ Lerdam, *Kongen og tinget*, p. 39.

the successful party to seize the estate, but they only provided a conditional right of possession of the property.⁶²

This is also the background for the later development of a procedure that was known as 'forfølgning til lås' ('pursuit to the lock'), which received its final form in 1621 but elements of the procedure appear around 1302⁶³ and at first appear almost identical to the procedure of king's letters. In contrast to the 1282 *håndfæstning*, this procedure was intended to secure for the successful plaintiff full rights of possession by means of a royal prohibition against the obstruction of his claim. This procedure appears at the latest from the time of Valdemar IV, that is post-1340.⁶⁴ The disadvantage of this procedure was that a third party who wished to object to the plaintiff's position gained the right to a so-called 'genbrev' ('letter of supersedence') from the king at any time during the case so that the case was temporarily suspended while the party who objected was heard. A case of this kind could easily extend over several years with letter of supersedence following letter of supersedence.⁶⁵ But when it was finished, the successful party at least, contrary to the procedure of the king's letters, would have full rights of possession.

By claiming such powers to decide a legal contest, the king identified himself as being in direct competition with the established administration of justice based around the *herreds-* and *landsting*, and it is very likely that this was one of the reasons that the Abel-Christopher Decree never achieved the status of valid law. In spite of this, many Danish kings took advantage of the practice of king's letters, as is clear from a rule in Eric Klipping's *håndfæstning* of 1282, which decided that king's letters were not to be issued until the culprit had been legally summoned to the *herreds-* or the *landsting* and had refused to produce a fine or compurgators imposed by the court. If the plaintiff did not follow this procedure, he was liable for fines to the king and the defendant. In other words, the king was compensated for refusing a plaintiff at the royal *ting* and instead referring him to one of the other *ting*,

⁶² Lerdam, *Kongen og tinget*, pp. 39–40. See also Jørgensen, *Dansk Retshistorie*, pp. 319–324. For examples, see DD 2:10:6 (1328); Rep. 2:2:2817 (1470); Rep. 2:1:657 (1456).

⁶³ DD 2:5:9. See also DD 2:7:67.

⁶⁴ Lerdam, *Kongen og tinget*, p. 41.

⁶⁵ Lerdam, *Kongen og tinget*, p. 43. See also Jørgensen, *Dansk Retshistorie*, pp. 518–519. For specific examples, see Rep. 2:2:3740 (1475); and more extensively Rep. 2:3:5935 (1486); Rep. 2:4:7581 (1494).

if he had not already appeared before them.⁶⁶ Thus according to the *håndfæstning*, a case had to be completed at one of the ordinary *ting* before the king was allowed to become involved, and this point was made in another section in the *håndfæstning*, which emphasised that the ombudsman could only summon a defendant to the right *ting*.⁶⁷

Thus the *håndfæstning* of 1282 allows us to conclude that the king used king's letters and passed sentences with a certain degree of avidity since King Eric's magnates wished to limit the king's clear competition to the established system of courts.⁶⁸ In the same manner, we can conclude from the many subsequent prohibitions against royal summons that Danish kings did not obey the command to respect the limitations in the use of king's letters or a certain sequence of courts—in reality one and the same thing—which they had agreed to in many formal statements.

In a privilege for the province of Skåne dating from 1317, Eric VI Menved reiterated that no one was to procure king's letters against others unless these had been sentenced by the *herreds-* or the *landsting*. This rule was later repeated by several kings in their coronation charters, namely King Hans (r. 1481–1513), Christian II (r. 1513–1523) and Frederick I (r. 1523–1533), and by several post-Reformation royal recesses.⁶⁹

The first instance of a clear sequence of courts—which appears to provide the possibility of appealing the decision of one court to another—is found in a decision from a *landsting* in 1302 in which the case had been “appealed to Sjælland's *landsting* since good men from the same *herred* pursued this appeal with the consent of both

⁶⁶ DRL 1:13, § 4, and its model, composed in Vordingborg immediately before, DRL 1:11, § 3 (text 1, Sjælland version).

⁶⁷ DRL 1:13, § 28.

⁶⁸ For previous conveyance at the royal court of law, see DD 2:3:343 (1289); DD 2:1:191 (1295); DD 2:1:249 (1297). Concerning the power-politics behind the royal charter see Andersen, *Rex imperator in regno suo*, pp. 139–145. We have several examples that show that the king also utilised the local court rather than his own to ensure a beneficial outcome in cases of conveyance to him, e.g. a case dating from 1367 in which King Valdemar IV demanded that conveyance take place at the provincial court in Viborg despite it already having been performed at the local court in Thy to ensure that he was protected against loss in case of later objections, see DD 3:8:32 and 79. See also Jørgensen, *Dansk Retshistorie*, pp. 519–520.

⁶⁹ See DD 2:7:436; DRL 2:37, § 16; *Den danske rigsløvgivning 1513–1523*, ed. Aage Andersen (Copenhagen, 1991) [hereafter DRL 3], here 1, § 34; *Samling af gamle danske Love*, 5 vol., ed. J.L.A. Kolderup-Rosenvinge (Copenhagen, 1821–1846) [hereafter SGDL], here 4, pp. 190–197, § 5; SGDL 4, pp. 214–236, § 3.

[parties]”.⁷⁰ Thord’s Articles, which date from the same period, even provide the possibility for the culprit to appeal a sentence in three-mark cases to the king if the appeal was made at the same session that passed the sentence.⁷¹ A decade later, other sources make it clear that *syssel*- and *herredsting* were by and large the same legal level while the *landsting* was above these.⁷² In the coronation charter (*håndfæstning*) of 1320, it was made clear to (or by) Christopher II (r. 1320–1326 and 1329–1332) that a case went from the *herreds*- to the *landsting* and from thence to the king before appearing in the final instance before the annual *Danehof* (the Danish medieval parliament), which—by its nature as a meeting of the magnates of the realm—was the forerunner of the privy council well into the fifteenth century.⁷³ This sequence of courts was repeated by Valdemar III’s *håndfæstning* of 1326 with an added provision for the king’s chancellor to respond to cases instead of the king.⁷⁴ This possibility was extended by the *håndfæstning* of Valdemar IV from 1354 to include the royal *drost* (the king’s main adviser in the royal council).⁷⁵ In the previous year Valdemar IV had declared that an appeal in a property case from the *herreds*- and the *landsting* had been conclusively decided when two judges from the *landsting* in Sjælland had testified to the royal court about the previous proceedings of the *landsting*.⁷⁶

In this connection it is important to pay attention to the fact that appeal procedures were not possible if a decision had been based on compurgation. It simply did not make any sense to appeal a sentence if it was just to be decided once again by compurgators who had already vouched for the defendant. In and of itself, the thought that it was possible to appeal a sentence means that it was possible to evaluate substantive proof.

Later on some texts mentioned the possibility to ‘skyde’ (‘transfer’) a case from one *ting* to another *ting*, i.e. to transfer a case from one

⁷⁰ DD 2:5:229. The terms are *appellauit* and *appellacionem*.

⁷¹ Thords Art. 82.

⁷² See DD 2:7:89.

⁷³ DRL 1:22, § 28.

⁷⁴ DRL 1:23, § 23.

⁷⁵ DRL 1:28, §§ 4 and 6. The king’s *drost* had the right to act as a judge, which is mentioned in a *responsum* from the Council of the Realm to the court from 1385, see DRL 1:34, § 21.

⁷⁶ DD 3:4:39.

court to another.⁷⁷ In a letter patent from 1443, we find a mention of transferring a case from the *landsting* to the royal court of law *if both parties had agreed upon this*.⁷⁸ This must mean that it was possible to transfer a case to another court after it had been initiated at one court before the first court of instance had pronounced a sentence as long as both parties agreed: a possibility that was also found in the early provincial laws that allowed the transfer of a case from the *herreds-* to the *landsting* if the parties could not settle their case.

To *skyde* the case was therefore not the same as making an appeal against a sentence, a point that was explicitly made by Christian I's directions to a peasant dating from 1451 concerning how the peasant was to pursue his rights by initiating a case where the disputed property was located and then—if he did not achieve his rights—to secure proof from the *ting* of their decision so that he could later appeal to the king or the chancellor of the realm.⁷⁹ In 1456 it was determined that a case had to be initiated at the royal court of law within six weeks of a decision made at the *landsting* by the production of letters from the *landsting*, including the certified sentence.⁸⁰ Christian I's Ordinance for Northern Jylland from 1466 prohibited the introduction of a case at the *landsting* if it should rightly be initiated at the *herredsting*, but the ordinance pointedly mentioned that it was possible to *skyde* a case to the *landsting* subsequent to a decision being made by the *herredsting*, in other words it allowed for an appeal.⁸¹ With the

⁷⁷ See the cases mentioned in Otto Kalkar, *Ordbog til det ældre danske Sprog (1300–1700)*, 5 vol. (Copenhagen, 1881–1918), here vol. 3, p. 800, 14 d.

⁷⁸ Rep. 1:3:7401, which is repeated in Christian II's coronation charter, see DRL 3:1, § 11.

⁷⁹ Rep. 2:1:23.

⁸⁰ Rep. 2:1:611 and its outcome in 2:1:649. The demand for an appearance within six weeks before the royal court of law or (in time) an appeal to this is mentioned as early as the beginning of the fourteenth century. It was extended to ten weeks in Jylland, probably because of its larger geographical distances, see DD 2:9:57. The rule is reiterated several times in royal statutes and summons, see DD 3:4:131, § 6; Rep. 1:3:6601; Rep. 2:1:657; Rep. 2:2:2817; *Corpus constitutionum Daniae. Forordninger, Recesser og andre kongelige Breve, Danmarks Lovgivning vedkommende, 1558–1660*, 6 vol., ed. V.A. Secher (Copenhagen, 1887–1918) [hereafter CCD], here 5:143 (2:6, § 8), but also at the level of the *herred* and the provincial court, see Rep. 2:1:1333. The six-week limit was common at the time of the provincial laws and is also known in connection with fines or providing surety, in other words in order to meet the requirements of a sentence, see DRL 1:15, § 9; DRL 1:16, § 4; DRL 1:17, § 5; Rep. 1:3:7341; Rep. 2:2:2817; SGDL 4, pp. 190–197, § 4.

⁸¹ DRL 2:30, § 8. The only exceptions to this were cases concerning the honour of nobles, which were to be decided by the court according to the same statute, see DRL

coronation charter of 1536, the possibility of transferring a case before a sentence had been passed was finally ended.⁸²

The terminology surrounding the action of transferring a case was thus not unambiguous in the fifteenth century, but several examples from the start of the subsequent century indicate that it was possible to transfer a case to another court than the one at which it had been initiated. During the sixteenth century this process could apparently only happen when one party gained the permission of a judge (and possibly also the magistrates) for this⁸³ or when the judge thought that his was not the right court to hear a particular case, for which reason the judge might *skyde* the case to its proper forum.⁸⁴

Compared to the letter patent from 1443 mentioned above, in which a transfer of the case from one *ting* to another 'only' required both parties' consent, the development of the procedure bears witness to the central power's tightening grip on the administration of justice in the following century. A transfer would then depend on the judge's agreement or initiative. At least this was the case formally speaking because we do find a case mentioned in 1573 in which a group of peasants refused to appear before the court in a nearby town and therefore had decided to *skyde* the case against them to the *herredsting*. This action, however, was categorically refused by the central administration, which found it not possible or permissible.⁸⁵

By this time, a hierarchy of courts had been confirmed time and time again. Christian II's Land Law (*Landlov*) dating from 1522 introduced a formal, normative and comprehensive description of the system of appeals from the *landsting* to the royal court of law, stipulating that the appellant had ten days from the pronouncement

2:30, § 6, which presumably also meant that the same was the case for cases dealing with other aspects of noble lives, see Jørgensen, *Dansk Retshistorie*, p. 520. This was the meaning of this rule when it was included in Christian IV's *Store Reces*—Great Recess—from 1643, see CCD 5:143 (2:6, § 12), in which it was simultaneously established that cases of ordinary people's honour were to be decided at the provincial court and not at lower courts, see § 14.

⁸² See SGDL 4, pp. 157–71, § 26.

⁸³ See for example Christian II's *Landlov*—Land Law—from 1522, see DRL 3:13, § 39.

⁸⁴ See a case from 1511, in which the provincial judge in Skåne transferred a case concerning land to the royal court of law because one party was able to produce a royal sentence in the case, see Rep. 2:7:11761. To transfer a case for this and similar reasons became increasingly common thereafter; compare the later discussion of the officials of the *herred*.

⁸⁵ See CDD 1:655.

of a sentence to approach the judge of the *landsting* to request an appeal to the royal court of law, upon which the judge was obliged to issue a letter (*skudsmål*) confirming that the appeal had been properly requested.⁸⁶ After the Reformation, this system of appeals was confirmed in Christian III's coronation charter from 1536 and in royal recesses dating from 1537, 1539, 1547, and in the Koldingske Recess dating from 1558.⁸⁷

The Odense Recess issued by Christian III in 1539 pulled together central elements of the new hierarchy of courts in paragraph 5. This stipulated that, *firstly*, no one could be summoned from the *herreds-* or the *landsting* by a king's letter before a sentence had been passed. *Secondly*, that a plea had to be entered in front of the official of the *herred* (the *foged*, that is the bailiff) or the *landsting's* judge before it was heard by the royal court of law. *Thirdly*, all sentences that were to be appealed were to be clearly described and sealed or signed by both parties before being presented to the king. *Fourthly*, the first- and second-instance courts had to have passed sentence before the king did so.⁸⁸ These stipulations were reiterated in many individual cases when the parties wished to present their case directly to the king.⁸⁹ From the end of the sixteenth century, it was even common practice to explicitly state the sequence of appeals—and thus reject cases out of hand that had not previously been decided by the *herreds-* and *landsting*—at the public proclamation of time and place when the royal court of law would be convened.⁹⁰

Thus the development away from a horizontal system of courts found in the provincial laws towards a hierarchical system of courts including the royal court of law took a long time. It began with the increased use of king's letters in the thirteenth century, developed increasing hierarchies during the fourteenth century—which required both parties'

⁸⁶ DRL 3:15, §§ 44–45. See for example Rep. 2:2:2477. Practice shows that this court made final decisions even earlier, see Rep. 2:7:11761 from 1511.

⁸⁷ *Samling af danske Kongers Haandfæstninger og andre lignende Acter* (Copenhagen, 1856–1858; repr. Copenhagen 1974) [hereafter SDKH], here pp. 82–89, § 26; SDGL 4, pp. 172–189, § 17; SGDL 4, pp. 190–197, § 5; SGDL 4, pp. 214–236, §§ 2–3; CCD 1:1, § 8.

⁸⁸ SGDL 4, pp. 190–197, § 5; later repeated in SGDL 4, pp. 214–236, § 2 and especially § 3.

⁸⁹ See *Kancelliets Brevbøger vedrørende Danmarks indre forhold*, 39 vol., ed. C.F. Bricka et al. (Copenhagen, 1885–2005) [hereafter KB], here 1556–60, p. 194 (1558), and KB 1571–75, p. 450 (1574).

⁹⁰ See KB 1580–83, p. 426 (1582).

agreement to *skyde* a case or to appeal a sentence to another court—and found its conclusion towards the end of the fifteenth century and the start of the sixteenth century when an appeal of a sentence or the transfer of a case that had been initiated but not concluded at a lower court only required the initiative of one party or a judge. However, even in the sixteenth century the system does not seem to have been so firmly established that it was known and accepted, or at least followed, by everyone since it was necessary time after time to reiterate the sequence of courts in many royal recesses and at the proclamation of the time and place for court sessions.

This last fact gives the impression that the process of establishing these hierarchies was primarily a project initiated centrally, but the real explanation of this development is probably more complex. In the thirteenth century, when Danish kings laboured to gain more political and economic influence on society, one of the means at their disposal was to give their subjects the possibility of raising a case instantly at the royal court of law, which thus came into direct competition with the local *herreds-* and *landsting*. There was therefore a swift reaction both locally and regionally demanding that it should only be possible to summon a party before the king by means of king's letters when a sentence had been passed by one of the earlier legal institutions. In other words, the initiative for this increased stratification of the legal system came from local and regional magnates in order to prevent the king from becoming a major player in the administration of justice. There can be little doubt that, in its early stages, royal power sought to increase its role in the administration of justice as far as possible and for this reason we must interpret the many prohibitions against the issue of king's letters as attempts to limit the king's efforts to expand his power base.

In time, the king enjoyed increased power locally to such a degree that, formally speaking, it was he that was to appoint or at least to recognise the increasingly autonomous judge. This, plus a concern for efficiency, led to royal power becoming increasingly involved in the stratification of a system of justice whereas prior to this only a few cases had reached the royal court of law. If local jurisdiction resided with the centre there would have been no reason to compete, and therefore royal concern increasingly focused on providing justice rather than using the legal system as an important part of the power-political struggle between central power and local and regional powers. The royal court of law thus in time developed from its beginnings as a

marginal means of administration of justice introduced as a response to local and regional concerns into the final possibility for appeal in a system of courts administrated by central power.⁹¹

I have previously suggested that Eric V Klipping's *håndfæstning* of 1282 symbolised the fact that the king had been forced by his magnates to recognise a plurality of laws and to give up any hope that he may have shared with his predecessors to compile a group of laws for the entire country. In the *håndfæstning*, King Eric promised to revert to the legal situation of previous decades and to respect 'King Valdemar's laws' (*leges regis Waldemari*) as these were contained in his 'law books' (*libris legalibus*), i.e. in the provincial laws.⁹² In this manner, the king finally acknowledged that in the future Denmark was to consist of several provincial legal circuits, a stipulation that was repeated in royal *håndfæstninger* for the next century.⁹³ With the exception of the islands of Lolland, Falster and Møn, which were granted the same law as Sjælland in 1284,⁹⁴ the phrase 'King Valdemar's laws' thus came to signify the legal order as it stood, with the provinces making up mutually independent legal circuits until *Danske Lov* was published in 1683.⁹⁵ In addition to the acknowledgement of a legal plurality, the magnates tried to put even narrower limits to new royal legislation by adding to the coronation charters of 1320 and 1326 that new laws required the consent of the entire kingdom at the annual parliament known as Danehof and later as *Herredage*.⁹⁶ However, this limitation of royal power was not successful. Many later royal statutes, which were sometimes directed at local problems and sometimes were meant

⁹¹ For a short introduction to the court's function and development see Ditlev Tamm and Jens Chr. V. Johansen, "Kongens ting, byens ting og bondens ting—studier i det danske retssystem 1500–1800", *Fortid and Nutid* 2 (1992), pp. 73–100.

⁹² DD 2:3:45 or DRL 1:13. The demand that in future each province have its own law is seen in several chapters, see [§ 2:]...in libris legalibus continentur....[§ 5:] Ordinamus insuper et firmiter promittimus leges regis Waldemari clare memorie, prout in suis libris legalibus continentur...[§ 7:]...in hiis faciant, secundum quod consueuerunt facere tempore Waldemari....[§ 14:] Item de naufragium passis uolumus obseruari quod in libris legalibus continetur....[§ 18:] Item quod ecclesia Dacie debeat gaudere omnibus libertatibus, quibus umquam floruit tempore regis Waldemari...."

⁹³ See DD 2:8:176, § 27 (1320); DD 2:9:273, § 22 (1326); DD 3:5:325, § I:1 (1360).

⁹⁴ See DRL 1:16, § 16. A similar command was later issued concerning Gotland when, in 1595, it was decreed that the island's inhabitants were to follow SkL and royal memorandas, see KB 1593–96, pp. 493, 512.

⁹⁵ See Jørgensen, *Dansk Retshistorie*, p. 66, who quotes DD 4:1:257. See also Gelting, "Skånske Lov og Jyske Lov", pp. 49–50.

⁹⁶ DD 2:8:176, § 37, and DD 2:9:273, § 46.

to apply more widely, are evidence that it was difficult for the magnates to enforce such a prohibition when faced with a continuous royal administration, and thus we see that the prohibition was not included in later royal promises and coronation charters. Thus the realm was moving towards a more homogenous state of law through the issuing of new statutes and an increasingly uniform administrative practice, but the process progressed slowly, not least because the primary foundation for justice in individual provinces remained the local provincial law codes.

Consequences for the administration of justice found their expression in the coronation charters and in later recesses. *Firstly*, nobody could be summoned to the royal court of law outside the limits of their province.⁹⁷ This meant that a man from Jylland could only be summoned to the royal court of law when it convened in Jylland. *Secondly*, regardless of where the royal court of law convened, the defendant was to be treated according to the laws of that province.⁹⁸ This guaranteed that, for example, a man from Jylland could only stand trial under Jylland law and not under Sjælland law, etc. In order to secure these privileges, Valdemar III's coronation charter of 1320 stipulated that the royal court of law was to use judges who were knowledgeable in the rights and the laws⁹⁹ of the individual province and that the king's official was to appoint one of the peasants of the *herred* as his locum.¹⁰⁰ *Thirdly*, no one was to be jailed, sentenced to death or fined unless he had been summoned, publicly accused and sentenced according to the rules contained in the local provincial law.¹⁰¹

As this hierarchy of courts was established and the post-Reformation royal court of law developed into a general court of appeal,¹⁰² the

⁹⁷ DD 2:8:176, § 36; DD 2:9:273, § 36; DD 4:1:40, § 31 (however, this had different geographical extents in various texts). Even King Magnus of Sweden and Norway, who ruled Skåne around 1340, recognised this privilege, see DD 3:1:50, § 9.

⁹⁸ DD 2:8:176, § 35; DD 2:9:273, § 36. There is an exception to this rule in Valdemar IV's statute from the Danehof in 1354, in which it is stated that after previous years' unrest a transgressor is to pay a fine to his victim according to the law of the province in which the transgression took place, see DD 3:4:131, § 3.

⁹⁹ DD 2:9:273, § 36.

¹⁰⁰ DD 2:8:176, § 33; DD 2:9:273, § 35; DD 4:1:40, § 35.

¹⁰¹ Already known in 1282, see DD 2:3:45, § 2, and later on repeated in DD 2:8:176, § 29; DD 2:9:273, § 24; DD 3:5:325, § I:1 og II:6; DD 4:1:40, §§ 16, 17 og 25; DRL 2:18, § 12; DRL 2:24. The rule that no one was to be bound without having been legally convicted seems to have been directed at royal officials in other contexts, see DRL 2:30, § 2; DRL 3:1, § 12; Rep. 2:5:10218.

¹⁰² See SGDL 4, pp. 172–189, §§ 17–18.

limitations on summons outside the jurisdiction of the defendant disappeared. The reason for this was that the royal court of law became increasingly stationary in the sixteenth century and increasingly focused on Copenhagen, although this did not mean that the defendant could be sentenced under laws other than those valid for his region.¹⁰³ Thus the most oft-cited precedents at the seventeenth-century royal court of law were the medieval provincial laws and the Koldingske Recess from 1558, which incorporated most of the post-Reformation legal reforms.¹⁰⁴ We gain the same picture from the use of legal precedents at, for example, the *landsting* in Viborg where the most frequently cited legal precedents at the beginning of the seventeenth century were the Law of Jylland and the Koldingske Recess with a sprinkling of reference to Thord's Articles, individual ordinances, a privilege granted to the city of Viborg, letters patent and missives from the royal chancery, various statutes and recesses, and in one single case a previous sentence from the royal court of law.¹⁰⁵

Thus the legal pluralism of 1282 based on provinces became so established that it remained a fundamental feature of the legal system until the start of the seventeenth century. When we turn to the development of the institutions for the administration of justice and the law of procedure it is therefore important to bear in mind that provincial variations continued. This despite the fact that these differences became less pronounced because of attempts by the central administration to homogenize the local administration of justice and that it is therefore sensible to describe the development of the various institutions as one. However, before that, I will describe the sources that are available for a study of this development.

Sources for the Period c.1300 to 1558

While I have so far mainly focused on the provincial laws as the sources for my investigation of the Danish law of procedure and the Danish

¹⁰³ This is emphasised in a sentence from 1604, see *Danske Domme 1375–1662. De private domssamlinger*, 8 vol., eds. Erik Reitzel-Nielsen and Ole Fenger (Copenhagen, 1978–1987) [hereafter *Da Dom*], here 6:818.

¹⁰⁴ See tables 11–14 in *Kongens retterting 1537–1660*, 2 vol., ed. Ditlev Tamm (Copenhagen, 2003), here vol. 1, pp. 80–88.

¹⁰⁵ See *Viborg Landstings Dombøger*, 6 vol., ed. Poul Rasmussen (Viborg, 1965–1988) [hereafter *VLD*], here vol. 5, pp. 43–48, with references to illustrative cases.

institutions of legal administration as these were found around 1250, the investigation of later developments until the time of the Koldingske Recess of 1558 will be based on a more diverse group of sources.

However, the sources that I am going to use will only consist of those sources that have been published in modern editions. These editions, in the main, cover both the legislation and a large part of the application of law at varying levels of courts so that it becomes possible to both follow the development of norms and how these norms were received. Thus in many ways we gain a more comprehensive and nuanced picture of the law of procedure than the one we received from the normative provincial laws. In the following, this material will be presented chronologically to give an impression of the development of law as an interaction between legislation, practice and the development of society.

As we have learned in previous chapters, the provincial laws were written down and edited over a long period, from *The Book on Inheritance and Heinous Crimes* from the end of the twelfth century to new linguistic and substantial editions of the *Law of Jylland* towards the end of the thirteenth century. Changes remained few with regard to procedure, but this does not appear to have been caused by a satisfaction with the workings of procedure found in the *Law of Jylland* and utilised in *Jylland* and *Fyn*.

Thord Litle—who, judging by the sources, was a judge at the *landsting* in Viborg—compiled a number of suggestions for improvements for parts of the *Law of Jylland* at the beginning of the fourteenth century, particularly concerning the law of procedure. His suggestions, which according to a royal statute from 1304 were to be studied and translated in order to possibly be implemented in existing laws at the first subsequent *Danehof*, that is a meeting between King Eric V Menved and the magnates of the realm in Helsingborg,¹⁰⁶ had originally been composed in Latin and in their first edition consisted of at least 53 articles. Subsequently, new articles were added so that the oldest surviving manuscript, which dates from 1450, included 97 articles (and a small appendix).¹⁰⁷ There is no indication that the *Danehof* in Helsingborg in 1304 included any of Thord's refinements or additions,

¹⁰⁶ See DD 2:5:310, § 7.

¹⁰⁷ See DGL IV (*Tillæg*), p. XXV. For the text, see pp. 79–108, and for the introduction, see pp. XXIV–XLVI.

but both the Latin text and later translations inform us that the articles were confirmed by King Valdemar at the Danehof in Nyborg so it is possible that the implementation took place at a later date and by a different king. This confirmation could have taken place either in 1326¹⁰⁸ or in 1354 where Valdemar IV convened a Danehof in Nyborg. The latter is most likely because this marked a quiet period in the kingdom after several turbulent decades under various kings and the dominance of Holstein over most of the kingdom.¹⁰⁹ The minor Valdemar III may have been acclaimed king at the meeting in 1326, but in these turbulent years he was rather a pretender to the throne of Christopher II (r. 1320–1326 and 1330–1332) and his son and co-regent Eric VII than a real monarch. It was hardly the reform of the law of procedure in Jylland that received the main attention of the young king, although there were a few legalistic stipulations in his coronation charter,¹¹⁰ and for this reason it is unlikely that the confirmation of Thord's Articles took place in 1326.

We cannot know for certain if the confirmation included all 97 articles contained in the oldest surviving manuscript, but regardless of precedence King Valdemar's confirmation is also mentioned in the Danish translations preserved from the sixteenth century and onwards.¹¹¹ The Latin text of the 97 articles was also included in both Brandis' and Ghemen's printed editions of the Law of Jylland in 1504 and 1508.¹¹² Thus the Latin text in its entirety appears to have been thought of as an authoritative text even though its content is varied, ranging from simple explanations of individual words through decisions established by practice to pure legal material. Thord's Articles thus reflect in the best possible way the mixture of practice, substantive law and linguistic refinement that is characteristic of the development of law from the end of the thirteenth to the sixteenth centuries.

The many other sources that can be used to illuminate the development of institutions of legal administration and the law of procedure until the middle of the sixteenth century are primarily letters, royal

¹⁰⁸ DGL IV (Tillæg), p. XXVI, incorrectly mentions 1321; see Jørgensen, *Dansk Retshistorie*, pp. 43–44, with further literature.

¹⁰⁹ See Niels Skyum-Nielsen, *Fruer og vildmænd I. Dansk middelalderhistorie 1250–1340* (Copenhagen, 1994), pp. 212–262, and the same, *Fruer og vildmænd II. Dansk middelalderhistorie 1340–1400* (Copenhagen, 1997), pp. 15–46.

¹¹⁰ See DD 2:9:273.

¹¹¹ For these, see DGL IV (Tillæg), text 2–8, general introduction pp. XXVI–XXIX.

¹¹² See DGL IV (Tillæg), p. XXVI.

recesses and town laws that dealt with conditions in Denmark, and which sometimes have the character of diplomas, that is documents of legal content.¹¹³ The diplomas and the letters, which include statutes, legal decisions and the written evidence of witnesses to legal acts performed at a *ting*, give us occasional glimpses of how the central power weighed evidence and how local authorities, in practice, performed the business of the court.

The normative statutes that regulated the law of procedure from the end of the thirteenth to the beginning of the sixteenth century were relatively few, if we disregard the significant number of town laws that were formulated, written down and confirmed by the king in this period.¹¹⁴ The regulation that took place often took the form of *håndfæstninger* that kings from the time of Eric V Klipping until the introduction of absolutism in 1660 accepted in connection with their accession. Initially, this took the form of a written confirmation by the newly elected king that he would respect the privileges and rights contained in the charter,¹¹⁵ which had been agreed with a meeting of the realm similar to a parliament. From 1448 the *håndfæstning* was conceded to the Council of the Realm, which took an ever-more institutional shape during the fifteenth century.¹¹⁶

This absence of royal legislation, which took place against a background of concrete power politics, also means that it is difficult to uncover the degree of legal knowledge and training that could be found in late medieval and post-Reformation Danish society. We simply do not have sources that allow the same degree of certainty as we do for the High Middle Ages (by which I mainly mean the provincial laws) and for this reason the traditional interpretation of late medieval

¹¹³ Most Danish medieval sources have already been introduced, namely: DD and Rep., which covers the period until 1513, but since previously unprinted materials were only published in excerpt, the *Repertorium* should be supplemented by the missives, i.e. closed and therefore often private letters that are published in the *Missiver fra Kongerne Christiørn I:s og Hans's Tid I-II*, ed. William Christensen (Copenhagen, 1912–1914) [hereafter Miss.]. Missives were closed letters, i.e. sent under seals, to individuals who were often royal officials or to individual noble recipients who were not royal officials but were beholden to the king. A great part of the missives must therefore be seen as instructions or royal commands.

¹¹⁴ See DGK.

¹¹⁵ Concerning the nature of these charters, see Andersen, *Rex imperator*, pp. 43–45. The most comprehensive treatment of these documents can be found in Henning Matzen, *Danske Kongers Haandfæstninger* (Copenhagen, 1889).

¹¹⁶ See DRL 1 and DRL 2.

Danish legal scholarship is that, by and large, it did not exist, with one important exception, namely the above mentioned glosses to the Law of Jylland by Knud Mikkelsen.¹¹⁷

To gloss a text was the medieval scientific method of decoding and thus create a greater understanding of the thoughts behind a text and Knud Mikkelsen's glosses were typical of the state of this art in the late Middle Ages. Originally, glosses were brief commentaries to and explanations of individual words in authoritative texts such as the Bible or the Corpus Iuris Civilis, but as glosses became more common and the accepted scholarly method of approaching a text these commentaries increased in scope and the best and most common of these almost independent and critical commentaries were from time to time attached to the collections of laws, having achieved an authority that was almost on a par with the laws themselves. This seems to have been the case with Knud Mikkelsen's glosses, which were included in the first printed editions of the Law of Jylland from 1504 and 1508 and which were translated from Latin to Danish within a century of their composition.¹¹⁸ It is disappointing that there is not much information to be gleaned from the glosses concerning the law of procedure. The reason for this is possibly that the law of procedure did not change much in the fourteenth and fifteenth centuries, and certainly not enough to make Knud Mikkelsen write about it.

We are in a better situation with the contemporary *Rigens Ret* ('The Law of the Land'), which contained rules based on concrete decisions and practices. *Rigens Ret* survives in a large number of manuscripts, which mainly contain legal materials, and in most manuscripts this collection is mentioned as a part of 'King Eric's *håndfæstning*'—a *håndfæstning* that was supposed to date from 1244, that is the time of Eric IV Plovpenning. However, in a few instances the rules of *Rigens Ret* are also associated with King Hans (r. 1481–1513) or even Valdemar II (r. 1202–1241).¹¹⁹

Most of the stipulations in *Rigens Ret* appear to be brief reports of judgements or responses, most likely compiled privately, and they were referred to in practice as early as the beginning of the sixteenth

¹¹⁷ These are published in DGL IV.

¹¹⁸ DGL IV (Tillæg), pp. VII–XXIV, and for the Danish text, pp. 3–75.

¹¹⁹ See *Rigens Ret* and its introduction in Da Dom VII, pp. 309–433, which also covers what follows.

century. The authority of the collection is reflected in the fact that it was printed as early as 1505 and that several of its rules were incorporated into royal legislation in the following century and in a number of recesses that attempted to gather together current law within different jurisdictions.

It was not only Knud Mikkelsen's glosses and *Rigens Ret* that were used with great authority at the beginning of the sixteenth century. The provincial laws, incorporating the Law of Jylland, were also popularised by being one of the first printed texts in Denmark. The interest that was meted out, in particular, to the law that was valid in Jylland must be seen as a consequence of an increased interest in updating the norms of the practice of the administration of justice and that the Law of Jylland offered a law of procedure that in many respects was more advanced than what was found in the law codes of Eastern Denmark. This did not mean that the law of procedure found in the Law of Jylland was ahead of its time in the sixteenth century, but it did conform to a higher degree to the procedure that was being used in practice than the procedural rules found in Valdemar's Law for Sjælland, Eric's Law for Sjælland and the Law of Skåne, amongst others in its focus on the duty of jurors to find the truth and not just accept objective proof. It is in this context that we must interpret Christian II's corpus of a new land law incorporating many procedural rules and a town law standardizing the plural legal situation in the beginning of the sixteenth century.

The two relatively large law codes that Christian II had composed and published during his short reign (r. 1513–1523) did not only auger a new era with regard to the law of procedure but it also signalled a new royal focus on influencing the development of society through legislation. As mentioned above, the development of law from the end of the thirteenth century and through the next couple of centuries can best be characterised as a mixture of practice, individual legislation and linguistic refinements—a process that did not allow for influence through the passing of legislation because of the vagaries of power politics. However, with Christian II's two law codes, the tide seems to have turned. In practice, they did not have much influence because in the year after their publication in 1522 they were annulled by the deposing of their author. In his short reign, King Christian had initiated wars against both the Swedes and the Hanse town of Lübeck, and when he single-handedly transgressed the powers that he had acknowledged in

his *håndfæstning* of 1513¹²⁰ by publishing a comprehensive corpus of laws his days of being supported by Danish magnates were over.

His successor on the throne was Frederick I (r. 1523–1533), who introduced religious freedom for Lutherans in Denmark. Christian II and all his predecessors had been Catholics, but now the way was paved for Frederick I's Protestant son, who was elected Christian III (r. 1536–1559). During his reign a royally-sanctioned Lutheran reform occurred in the country.

Christian III initiated the most ambitious programme of legislation seen in Denmark for centuries as part of his attempts to consolidate his power and the Lutheran Reformation. There were at least two reasons for his use of this most profitable instrument of power-politics: his accession to the throne had been preceded by a civil war that had lasted for several years, and in addition to this it is unlikely that the inhabitants of the kingdom, who had previously been adherents to the Catholic faith, immediately changed their allegiance to follow the reformers.

Although his primary aim was a reform of the state church, which he had created, as early as 1539 Christian III published a recess in the town of Odense that contained normative principles for the administration of justice and for the hierarchy of courts. This recess was followed by new procedural rules in 1547 and 1551 through recesses issued in Copenhagen and Dronningborg and on 13 December 1558 all of Christian III's innovations were collected together in the *Koldingske Recess* (named after the town Kolding in Jylland), which was a comprehensive and impressive piece of legislation for its time.¹²¹

However, it is one thing to legislate and another to apply the rules in practice. We find sixteenth-century sources that give the same impression that we have gained from the late medieval sources that procedure and the administration of justice in reality took place locally. Thus, letters patent and memoranda frequently mention concrete cases and decisions that illustrate the problems faced by the courts and how these problems were solved.¹²²

¹²⁰ See text 1 in DRL 3.

¹²¹ See SGDL 4.

¹²² See CCD; *Kong Frederik den Førstes danske Registranter*, eds. Kr. Erslev and W. Møllerup (Copenhagen, 1879) [hereafter FFR]; *Danske Kancelliregistranter 1535–1550*, eds. Kr. Erslev and W. Møllerup (Copenhagen, 1881–1882) [hereafter DKR].

Secondly, a significant number of sentences survive that describe procedure and depositions and thus give us a good insight into the role of the judge, the means by which depositions could be taken, how evidence was evaluated, etc. Unfortunately we do not have many surviving from before the sixteenth century. From 1551 the law commanded that the lower courts keep records of proceedings,¹²³ but none of the *tingbøger* (act books) that survive date from the sixteenth century. This is not necessarily because they were not kept but rather caused by the constant warfare between Denmark and Sweden in this period, for this seriously impacted on the archives of the local administration, the *len*. Thus, the few surviving act books of the sixteenth and early seventeenth centuries originated in areas that were less affected by the wars or areas in which it was possible to transfer the books to a safe place. In this connection it is worth mentioning the large number of act books series that start immediately after the two so-called 'Carl Gustav wars' (1657–1660). The same is true for the sentences of the *landsting*, although we do find examples of their decisions in private collections that were compiled by legal officials and others with an interest in law during the sixteenth century as a part of their duties and for professional development.¹²⁴ Among these we find a number of sentences from the royal court of law, although these pale into insignificance in comparison to the almost complete records surviving from the royal court of law from the period 1537 to 1660.¹²⁵

Thirdly, the repetition of normative rules can probably be seen in most cases as an expression of the fact that these rules were not followed in practice and therefore had to be reiterated at least once but often more times.

¹²³ This demand appears in § 3 of Christian III's Dronningborgske Recess, see SGDL 4, p. 238.

¹²⁴ *Udvalg af gamle danske Domme: afsagte paa Kongens Retterting og paa Landsting*, 4 vol. ed. J.L.A. Kolderup-Rosenvinge (Copenhagen, 1842–1848) [hereafter UGDD]; see also *Da Dom*.

¹²⁵ From these some have been published in full and others in calendar or in outline. The texts that are published in full can be found in UGDD (which contains decisions from 1457–1596) and *Da Dom* (which contains decisions from 1375–1662), but these are supplemented by *Det Kgl. Rettertings Domme og Rigens Forfølgninger fra Christian III's Tid*, 2 vol., ed. Troels Dahlerup (Copenhagen, 1959–1969) (covering 1537–1544), and for texts that are not published in full, see the outlines in *Kongens retterting 1537–1660*, vol. 2, ed. Ditlev Tamm (Copenhagen, 2003) (which covers all decisions from 1537–1660).

Fourthly, the royal administration in the later Middle Ages and immediately after the Reformation may best be characterised as decentralised under controlled forms. However, the level of control increased so much in the latter part of the sixteenth century that for all intents and purposes the period of autonomous decentralised administration must be said to have come to an end. Thus it was at this time that a stream-lining of the administration was implemented in which the royal chancellery assumed the role of the officious control of the way in which the *lensmænd* and the officials of the institutions of administration of justice and the local legal institutions across the kingdom executed their duties. The chancellery was thus much more involved in the work to streamline and protect the law and the administration of justice against abuse than had previously been the case, and therefore it is only in the second part of the sixteenth century that the documentation of the actions of the institutions of legal administration increase significantly in number.

One thing was the zealous control of the central administration; another thing was the work and tasks of the institutions of legal administration. The tasks and their distribution to offices were not different in nature by the end of the sixteenth century, and therefore *mutatis mutandis* we may presume that the problems that the courts faced were not new but that they also existed in the first part of the century without leaving traces in the less rich survivals of the previous period. Therefore, I will cautiously suggest that some of the examples of bad practice, etc., which are mentioned in cases from the second half of the sixteenth century may also represent the state of the administration of justice in the decades between the Reformation and the publication of the Koldingske Recess. Therefore, from time to time I will utilise some of the information that is afforded by sources dating from the second half of the sixteenth century.

With these cautionary words about the nature of the sources that I am using for this investigation, I shall now turn to the institutions for the administration of justice and the law of procedure as these developed in the later Middle Ages and after the Reformation. In what follows I will therefore initially study two legal institutions that we know already from the provincial laws, namely in chapter 8 the *herredsting* and in chapter 9 the *landsting*. Part of this investigation will include the development of offices and groups of personnel who had previously had or continued to enjoy sentencing functions and those

offices that followed as a consequence of political and socio-economic developments. Subsequently, two of the 'exceptions' to the *herreds-* and *landsting*, namely the *birketing* and the *byting*, will be treated in chapters 10 and 11 while the establishment of the offices of the royal court of law will be described and analysed in a final chapter. After this I will conclude this second part of my study and summarise the development of the provincial laws until the time of the Koldingske Recess of 1558.

CHAPTER EIGHT

PRACTICE AND REGULATION AT THE *HERREDSTING*

The court with sentencing functions that the majority of inhabitants of the Danish realm would have encountered most frequently was their local district court (*herredsting*). With the exception of the boroughs and the peculiars (*birke*), which only contained a small proportion of the inhabitants of the realm, the district court was the first-instance court for the majority. Thus there were far more district courts than any other kind of court and we find significantly more sources concerning conditions in the district court than for other courts. This is the reason why this court forms the basis for my investigation of the institutions for the administration of justice and procedural law in Denmark from the beginning of the fourteenth until the middle of the sixteenth century.

What I shall investigate in this chapter is how the institutions for the administration of justice developed and to what extent such developments influenced practical procedure and its legal regulation—or vice versa. In this and following chapters some reference will be made to studies outside Denmark in so far as they can contribute to an explanation of developments or add further insight into the Danish legal system and procedural law.

The Local Court's Regulation and Organisation

The provincial laws, in particular the Law of Jylland, demanded that provincial and local courts met every fortnight,¹ and this custom continued in subsequent centuries. According to Eric's Law for Sjælland, a court should begin at dawn² and it was not permitted for the courts to convene on holy days, a demand that was emphasised after the Reformation by Christian III's Dronningborgske Recess in 1551.³ After the

¹ See JL I 50, II 5 and II 53.

² ESL II 48–49.

³ See ESL II 48–49 and the Ordinance on Manslaughter in DD 1:4:24; see also SGDL 4, pp. 237–246, § 1.

Reformation this led to a situation in which local courts convened just after holy days if necessary and this, I presume, must also have been the case during the Middle Ages because the demand that the courts had to meet every fortnight seems to have been a minimum requirement. Both locally and centrally there was no hesitation about changing the date or place of court sessions (which according to Eric's Law for Sjælland demanded both a royal permission and local agreement)⁴ if several local courts in the vicinity met on the same day so that the *lensmand* could not attend all of them;⁵ if the *herred's* boundaries were changed;⁶ or if the court convened in a unsuitable location, for example far from farms or in a town or village where it was possible to drink to excess before the court convened.⁷

Although they are few, the rules that we find in Eric's Law for Sjælland concerning the regulation of the courts are the most extensive amongst the medieval provincial laws. Its emphasis that local courts should convene at dawn indicates that there were problems in meeting this condition, and it seems that some courts began so late that freemen had difficulty getting home before dark.⁸ Some apparently objected to this and thus new regulations changed the law of Sjælland by decreeing the time courts should start. That there were continued problems in forcing influential men or the local royal officials to abide by these rules in the fifteenth century is evident from the continued reiterations in royal legislation and from the royal administration's threats to remove *lensmænd* and bailiffs from their offices if they abused their position⁹ and tried to influence the administration of the *herred*. It is apparent that the *lensmænd* (and also the ordinary inhabitants) could act comparatively independently because of the great distances to

⁴ See ESL II 51.

⁵ See for example KB 1580–83, pp. 188–189 (1580); KB 1580–83, p. 590 (1582).

⁶ See for example KB 1550–55, pp. 170, 180, 255–256 (all from 1552).

⁷ Moving and combining courts was common as early as the beginning of the thirteenth century, see DD 2:5:30, and was commonly taking place, see for example CCD 1:44, 84, 443, 462, 468, 502, 755, 760 and 793 and CCD 2:88, 90, 171, 204, 209, 317, 324, 331, 353, 360 and 614. Problems with excessive drinking led to a ban on inn-keeping and beer sales at local courts (and in cemeteries during Divine Service) in the district of Helsingborg in 1581 since it caused disturbance and sometimes even murder, see KB 1580–83, p. 356 (1581).

⁸ This is given as the reason for convening local courts at nine o'clock; see KB 1580–83, pp. 491–492 (1582).

⁹ See esp. Christopher of Bavaria's Land Peace of 1442 in DRL 2:13, § 2, which is reiterated in Christian I's Land Peace of 1455, see DRL 2:24, § 2. Also compare to the mention of the *herred's foged* below.

higher authorities and because the directions sent out by the central administration, if they existed at all, were probably so brief that they were open to interpretation by the local administrator.¹⁰

From the fifteenth century it is clear that freemen—who now began to form an estate by themselves—did not generally accept the arbitrariness of larger landowners but reacted against this by joining together in court or even by complaining directly to the central administration.¹¹ It thus seems that in the period immediately surrounding the Reformation there was a certain faith in the existing system. The closeness of the courts, the participation of the people in juries and as *stokkemænd* ('adjudicators'), and the use of the vernacular all contributed to a widespread use of the courts for the resolution of conflict.¹²

Court meetings, however, also resulted in disturbances. It is clear from laws, act books and mentions in documentation from the central administration that disturbances in local courts were comparatively common. We find described in a proof of court actions from 1486 how two men forced a third to appear in court by marching him there at the point of their readied crossbows,¹³ while another proof of court actions dating from 1504 mentions a settlement brought about by the death of a freeman who violently opposed appearing before the court in a case of theft.¹⁴ The convenor of the court, the *herred's* official, and the *herred's* scribe, who took down all decisions in writing, were frequently verbally or physically abused.¹⁵ Thus we find in Christian III's 1547 Copenhagen Recess and the Koldingske Recess of 1558 that he who disturbed the court or threatened the judge was to pay a fine of

¹⁰ This was the case at least after the introduction of absolutist rule in 1660, see Gunner Lind, "Den heroiske tid? Administrationen under den tidlige enevælde 1660–1720", eds. Leon Jespersen and E. Ladewig Petersen, *Dansk forvaltningshistorie I. Stat, forvaltning og samfund. Fra middelalderen til 1901* (Copenhagen, 2000), pp. 159–225, esp. 200–201. Whether *lensmænd* had real influence over local administration is uncertain, see Jørgensen, *Dansk Retshistorie*, pp. 348, 362–363, 507–508, 515.

¹¹ See Netterstrøm, *At forsvare til rette*. For a comparable later situation, see Ladewig Petersen, "Reformationstiden 1536–96", p. 83, and Korff, *Ret og pligt i det 17. århundrede*.

¹² This is clear post-Reformation, see Jens Chr. V. Johansen, "Judicial Behaviour in Early Modern Denmark", eds. Jens. Christian V. Johansen, E. Ladewig Petersen and Henrik Stevnsborg, *Clashes of Cultures. Essays in Honour of Niels Steensgaard* (Odense, 1992), pp. 94–106.

¹³ Rep. 2:3:5831.

¹⁴ Rep. 2:5:10136.

¹⁵ See for example KB 1566–70, p. 413 (1568); KB 1580–83, pp. 7, 10, 80 and 143 (1580); KB 1584–88, pp. 317, 339–340 and 342–343 (1585).

three marks to the judge himself and also to his employer (unless the transgression went as far as a killing—in such cases the perpetrator had to appear before *sandemænd* or their equivalent and faced the possibility of losing his *hovedlod* and the protection of the law).¹⁶ This kind of rule, in which a fine depended on social status and economic ability,¹⁷ originated in older practice, and such laws emphasised that a person was subject to the *tingfred* (the peace of the court) from the time they left their home until their return.¹⁸ This was also a rule in the spirit of the medieval laws, in particular Eric's Law for Sjælland, although this stipulation had probably been enforced across the realm for an extended period of time.¹⁹

Initially local courts convened in the open (as is evidenced by the many mentions of court relocations) and it was not until 1522 that we find mention of a dedicated local courthouse. Christian II's 1522 Land Law ordered that towns must build a courthouse for provincial and local court proceedings and that they had to be large enough to include the parties involved but no larger since this would only lead to unrest. In other words, attendance changed with each new case.²⁰ However, this is a normative text (which was annulled the following year when Christian II was deposed) and therefore it is not possible to decide whether courthouses were a common feature around that time²¹

¹⁶ SGDL 4, pp. 190–197, § 7 (1539); SGDL 4, pp. 214–236, §§ 4 and 9 (1547); CCD 1:1, §§ 10 and 23 (1558).

¹⁷ See Rigens Ret in Da Dom VII, pp. 346–433, §§ 5, 7 and 9 (c. 1450) concerning the consequences of such offending deeds; DRL 3:13, §§ 47 and 55 (1522).

¹⁸ Thords Art. 73 (c. 1450); SGDL 4, pp. 214–236, § 9 (1547); CCD 1:1, § 23 (1558); also known from a recess of 1539, see SGDL 4, pp. 190–197, § 7.

¹⁹ See ESL II 29 and II 17. The peace of the court is most thoroughly regulated by ESL and is otherwise only mentioned in A & O III 1 (which was most likely intended to be valid for the entire kingdom) in connection with homicide—the peace of the court thus from an early time appears to have been applied across the country and the more stringent rules covering this in ESL were most likely introduced in other provinces as well.

²⁰ DRL 3:13, § 37. § 38 demands that each freeman should contribute two *skillinge* towards its construction.

²¹ The construction and use of courthouses did not affect the form of procedure and its social implications since courthouses simply meant that courts were now conducted under a roof, that is that the introduction of courthouses did not mean that there was an attempt to separate the legal sphere into a separate concrete form in which the parties were removed from their ordinary social environment and context. Such a trend seems to have been underlying this process in other locations, see the Milan-based case-study of Franz-Josef Arlinghaus, "From 'improvised theatre' to scripted roles: literacy and changes in communication in North Italian law courts (twelfth-thirteenth centuries)", ed. Karl Heidecker, *Charters and the Use of the Written*

for the mention of such buildings is not common until the seventeenth century.²²

Surviving sources do not allow us to say anything for certain about the layout of a court in the thirteenth century, but around 1300 courts appear to have been held in a square bounded by large stones. Boards or logs were laid upon the stones so that those present—primarily the leader of the court and those who were well regarded—could sit down. These seats are known in the sources as *tingbænke* (court benches), *tingsskamler* (court stools) and as *tingstokke* (court beams). Behind those who sat down stood those who could not and the court action took place inside the benches. In other words it was here that litigants, witnesses, jurors and official criers acted out their parts in the proceedings.²³

It was in the same period as the appearance of courthouses, that is the mid-sixteenth century, that the *herreder* began to possess their own seals and signets to seal judgements and other documents. A few such seals are known as early as 1365,²⁴ but it is only after the Reformation that documents sealed with the *herred's* seal are mentioned explicitly. The first mention of such a sealed document dates from 1556²⁵ and it is clear from documents issued in the 1580s that each *herred's* seal was kept by twelve *herredsmænd*, i.e. men living in the *herred*, so that the official—who in some cases had previously been entrusted with its keeping—would not be able to abuse the seal; in return a document carrying the *herred's* seal only gained legal force when it was counter-sealed by the *herred's* official's personal seal.²⁶

The introduction of such seals—or at least the increased mention of these—was undeniably linked to an increased use of written

Word in Medieval Society (Turnhout, 2000), pp. 215–237; my thanks to Kim Esmark for drawing my attention to this.

²² See Tommy P. Christensen, “Ting, tingsted, tinghus—træk af en udvikling”, eds. Peter Garde, Claus Larsen, Annemarie Højer Pedersen and Bjarne Pedersen, *Danmarks tinghuse* (Copenhagen, 2006), pp. 11–21. See also Andersen, *Studier i dansk proceshistorie*, pp. 128–129.

²³ For this general characterisation, see Jørgensen, *Dansk Retshistorie*, p. 244, which is based on Rep. 1:3:7407 (1444); Rep. 1:3: 7692 (1447); Rep. 2:1:780 (1457); Rep. 2:1:1070 (1460); Rep. 2:1:1333 (1461).

²⁴ See Poul Bredo Grandjean, *Danske Herreders Segl indtil 1660* (Copenhagen, 1946), p. 19.

²⁵ KB 1556–60, p. 49 (1556).

²⁶ KB 1580–83, p. 667 (1583). See also the mention in KB 1584–88, pp. 339–340 (1585).



III. 1. Scene from a *herredsting*, i.e. a district court.

documents in legal contexts. Paper made its appearance in Denmark around 1400 and this meant a marked increase of materials for writing in the marketplace, which must have caused a general lowering of prices, probably also of the price of parchment. Of course it would still have been possible to buy expensively prepared luxury vellum but the difference in price between ordinary vellum and paper was probably not terribly large. In any case, it must have been cheaper to produce written documents concerning property and legal transactions and thus it became possible for every man to have his transactions, sentences and so on taken down in writing. By the second half of the fifteenth century the balance between parchment and paper documents changed so that from this time onwards it was more common to use paper than parchment.²⁷

It is in the same period that we see literacy become an integral part of the environment of Danish farmers, especially in connection with letters of contract and proofs of court actions concerning farms, and many farmers, like their contemporaries in the towns, used signet rings to 'sign' letters with their personal stamp.²⁸ Such seals and written documentation of real-estate transactions and similar had previously been something transacted only amongst the king, the nobility and the prelates,²⁹ but now became common practice and part of common thinking. Thus the apparent monopoly on writing that notaries had possessed until this time³⁰ was broken and it became possible for virtually everyone to issue and witness their own documents.³¹

Types and Volume of Cases

The number of cases conducted at the local courts varied in relation to the geographical extent of the *herred*, the location of the court and

²⁷ Jens E. Olesen, "Middelalderen til 1536: Fra rejsekedømmene til administrationscentrum", eds. Leon Jespersen and E. Ladewig Petersen, *Dansk forvaltningshistorie I. Stat, forvaltning og samfund. Fra middelalderen til 1901* (Copenhagen, 2000), pp. 4–48, esp. 36–37, and Thelma Jexlev, "Om anvendelsen—og anvendeligheden—af papir som dokumentmateriale i danske middelalderbreve. Nogle iagttagelser", *Arkiv. Tidsskrift for arkivforskning* 1 (1966–67), pp. 87–99.

²⁸ Bjørn Poulsen, "Danske bønders brug af skrift i senmiddelalderen", eds. Agnes S. Arnórsdóttir, Per Ingesman & Bjørn Poulsen, *Konge, kirke og samfund. De to øvrighedsmagter i dansk senmiddelalder* (Aarhus, 2007), pp. 381–414.

²⁹ See Gelting, "Circumstantial Evidence."

³⁰ For an analysis of the sparse evidence for the work of notaries in Denmark, see Fenger, *Notarius publicus*.

³¹ See CCD 2:246 (1581) and CCD 2:301 (1582).

the demographic and social-economic composition of the area. If the court was far from a litigant's residence it was less likely that he would seek the court's decision in lesser, insignificant cases since appearing before the court would cost him a day's fieldwork and, in addition, we must expect that if the number of inhabitants in a *herred* was not high the number of cases initiated would not be as high as in more closely inhabited *herreder*. It was also the case that the socio-economic demography would decide the number of initiated cases because initiating a case demanded both that the plaintiff and the defendant could afford to do so.

Although the number of entries in act books after the Reformation does not necessarily tell us how many cases were initiated—since a case could last for several sessions of the court³²—their numbers do indicate how busy the local courts were in this period. An analysis of local act books shows that there was great variation between *herreder* and that the number of cases entered into their act books varied from two to fifteen a week.³³

Looking closer at what the entries deal with, Knud E. Korff has enumerated the entries in Aasum *herred* on the island of Fyn for the first half of the seventeenth century. 39% of entries dealt with debt, 19% with crimes, 18% were socio-economic disputes, 16% were items of information, publication, renunciation, appointments of valuers, declarations of proclamations, etc., and finally 8% of cases were miscellaneous, for example cases referred to other legal instances, exchanges, military matters and such like.³⁴ A not-insignificant part of these cases were concluded in settlements (23 of these were settled either in or outside court) or in arbitration (22). In other words, the parties had renounced the possibility of bringing a case before a judge and had instead accepted the final binding decision of an arbiter or a group of arbiters.³⁵ In one case the decision was subsequently referred to the

³² Gustav Henningsen, Jens Chr. V. Johansen and Ditlev Tamm, "16.000 jyske domme: En sagstypologisk analyse af Hofman-Bangs regeft til Viborg Landstings dombøger 1569–1805", *Fortid og Nutid* 27 (1979), pp. 240–270, esp. 242; Jens Chr. V. Johansen and Henrik Stevnsborg, "16.900 retssager. Om retsarkiver, sagstypologi og procesøkonomi", *Fortid og Nutid* 32 (1985), pp. 100–113, esp. 105.

³³ Andersen, *Studier i dansk proceshistorie*, pp. 132–133.

³⁴ Korff, *Ret og pligt i det 17. århundrede*, pp. 24–25.

³⁵ See gr. 15 and gr. 33 in the Aasum act book, p. 6 and 16–17, concerning settlement and arbitration. The act book is published in *Aasum Herreds tingbog*, 4 vol. (Copenhagen, 1956–1961—and a vol. containing a subject index, eds. Ole Fenger,

provincial court because one of the arbiters was the official,³⁶ which was an unusual situation—unless of course a proportion of such cases were not entered into the act book.

We find the same in the act books from Sokkelund and Skast *herreder* from Sjælland and Jylland respectively, although we find more settlements than arbitrations in Sokkelund (10 and 16 respectively) and a preponderance of arbitrations in Skast (89 and 49).³⁷ This may indicate that there were different traditions in the two *herreder* for how to settle a case if the parties did not wish to have a sentence passed. In Skast unbiased ‘good men’ decided the case while Sokkelund preferred a negotiated settlement. Among the 18 arbitrations that were recorded in the Sokkelund act books, two were rejected by the judge and as a consequence the parties requested a sentence.³⁸ If the court judge disagreed with the outcome then he could intervene and change an agreement. We even have an example from Sokkelund where a settlement that had been previously agreed outside the court faced the demand that it be re-stated in court.³⁹

These figures come from sources later than the period under investigation, but they give the impression that there were local traditions and that the preferred solution was a negotiated agreement between two parties. This appears to have been the case in previous centuries as well.

Carl Rise Hansen, Ebba Hjorth and John Kousgård Sørensen (Copenhagen, 1982)) [hereafter Aasum].

³⁶ See Aasum 1641:140.

³⁷ See gr. 15 and gr. 33 in the act books for Sokkelund, pp. 7 and 20–23, and Skast, pp. 7–8 and 15, concerning settlement and arbitration. The two act books are published in *Sokkelund herreds tingbøger*, 8 vol., eds. Ole Karup Pedersen and Karen Marie Olsen (Copenhagen, 1957–1980—and a vol. containing a subject index, eds. Ole Fenger, Carl Rise Hansen, Ebba Hjorth and John Kousgård Sørensen (Copenhagen, 1985)) [hereafter Sokkelund], and *Skast herreds tingbog*, 7 vol., eds. Poul Rasmussen, Kirsten Prange and Aase Rosenberg Rasmussen (Copenhagen, 1955–1966—and a vol. containing a subject index, eds. Ole Fenger, Carl Rise Hansen, Ebba Hjorth and John Kousgård Sørensen (Copenhagen, 1980)) [hereafter Skast].

³⁸ See Sokkelund 1633:59 and 127. A settlement could be declared invalid and followed by a subsequent sentence, see Sokkelund 1629:229, 1631:52 and 1634:103 and Skast 1637:189 and 1638:514. See also Skast 1638:571, 1637:432, 1637:918 and 1639:27.

³⁹ See Sokkelund 1622:122.

Information Forum—Proclamations and Landstingsridere

As is evident from my analysis above, one-sixth of the entries in the Aasum act book dealt with information, publication, renunciation, appointments of valuers, declarations of proclamations, etc. The local court thus not only functioned as the location where legal disputes were settled but also as a forum in which information was distributed concerning new legislation and other reforms by the central administration and concerning news in general.

In 1467 the central administration demanded that royal letters patent—open letters to the inhabitants of the realm—were to be read aloud in court,⁴⁰ although this had been the tradition for a long time when such letters concerned local matters.⁴¹ Thord's Articles, the first half of which was composed between 1282 and 1304,⁴² stipulated that the names of men who had become outlaws were to be taken down and read aloud between two and four times a year in the court where the sentence had been passed, and that this was to happen when the court saw the largest number of participants.⁴³ Whether this was common practice is impossible to decide because surviving sources from subsequent centuries do not provide any evidence for this. On the other hand we know that in the latter part of the sixteenth century—when there was an increasing control and uniformity of the conduct of courts—the central administration commanded that both local and provincial courts were to proclaim summons, sentences and *mand-helgsbreve*, letters that disqualified individuals as witnesses to court actions in order to ensure that persons who were not suitable did not decide disputes.⁴⁴ The public reading of these legal documents was undoubtedly performed at this time by the scribe, who had copied these documents into the act book, though by the seventeenth century the public reading of royal letters, mandates and statutes was to be performed by the *lensmand*.⁴⁵

⁴⁰ Rep. 2:2:2303.

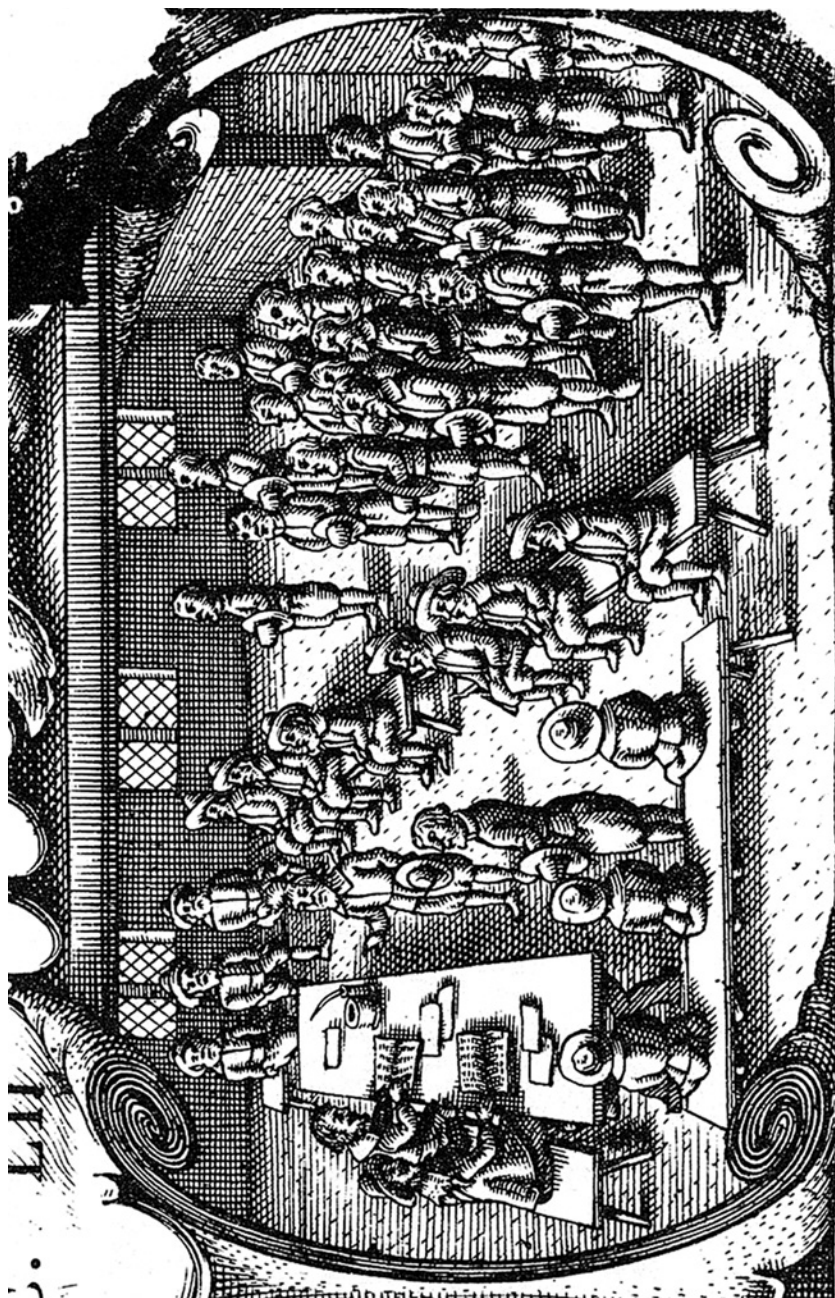
⁴¹ See for example DD 1:2:79; my thanks to Michael H. Gelting for drawing my attention to this. See Jørgensen, *Dansk Retshistorie*, pp. 19–23, concerning declamation of the law, law-speakers, etc.

⁴² See DGL IV (Tillæg), pp. XXIV–XLVI.

⁴³ Thords Art. 50.

⁴⁴ KB 1576–79, pp. 465–466/CCD 2:134 (1578) and repeated in KB 1580–83, p. 601/CCD 2:322 (1583).

⁴⁵ Whether the *lensmand* personally had to read out such letters, mandates and statutes is unclear, but there is no doubt that he had to be present in person, see CCD 3:35 (1596).



Ill. 2. Scene from a *herredsting*, i.e. a district court, in the seventeenth century. Note the physical similarities with the scene from Olaus Magnus' drawing of the benches.

The inhabitants of post-Reformation *herreder* seem to have been well informed about current law, but that does not mean that they gained this knowledge from the public reading of statutes, and this was particularly so in the Middle Ages. At that time we must assume that any knowledge of current law was gained through an individual's encounters with law as court action witnesses, jurors and so on,⁴⁶ sometimes supported by the activities of the local priest, just as was the case after the Reformation.⁴⁷ That this was not enough for the central administration at the beginning of the sixteenth century is evidenced by the appearance of an institution in the local courts at that time and which was established intentionally to raise the level of knowledge, namely the so-called *landstingsridere*. The *lensmænd* were commanded by Christian II's 1522 Land Law, on pain of fine, to send an auditor to the provincial court so that he could subsequently inform the local court about relevant transactions undertaken there.⁴⁸ As far as I have been able to see from the sources, the 1522 law contains the first mention of such a *tingridere*, however it is not until 1576 that we find the next mention of *landstingsridere* (who at that time were criticised for not performing their office).⁴⁹ The intention was clear but, in this as in many other matters, intention was not the same as practice.

The Governance of Court—The Official

We saw in our analysis of the institutions for the administration of justice in the provincial laws that the king, at least formally, tightened his grip on Danish society locally during the thirteenth century with the assistance of his appointed or nominated ombudsman.

The office of ombudsman did not exist at the time when the first provincial laws were written down, but the laws mention a royal official with corresponding powers, the *bryde* (the administrator of a royal manor). This official had only a few external functions apart from his duty to administer the royal estate, but these were clearly executive

⁴⁶ See Korff, *Ret og pligt i det 17. århundrede*, pp. 26–27, 208–209.

⁴⁷ Martin Schwarz Lausten, *Danmarks kirkehistorie* (Copenhagen, 2nd ed., 1987), pp. 126–138; Charlotte Appel and Morten Fink-Jensen, *Når det regner på præsten. En kulturhistorie om sognepræster og sognefolk 1550–1750* (Højbjerg, 2009).

⁴⁸ DRL 3:13, § 46.

⁴⁹ KB 1576–79, p. 67/CCD 2:28 (1576). See also Andersen, *Studier i dansk proceshistorie*, pp. 135–136.

and he had a few possibilities of initiating court cases on behalf of the king.

This either changed or had already changed when the Law of Jylland was composed in 1241 because this text refers unequivocally to the ombudsman (an official who performed a task for another, in this case the local ombudsman for the king). According to the Law of Jylland, this ombudsman was closely associated with the *herred* and, apart from receiving taxes and fines and apprehending people who had been summoned to court, he was also charged with receiving the oaths of newly appointed jurors on behalf of the king. In the Abel-Christopher Decree from the mid-thirteenth century the composers of this text tried to give the ombudsman sentencing powers, but this was rejected and the decree was never implemented, probably because of local resistance. Therefore, the ombudsman was not given sentencing functions, which makes him similar to the local *baiulus* in Sicily who functioned as the day-to-day leader of the local court—in which a learned judge (*iudex*) passed sentence according to the Sicilian King Frederick II's legislation, which also granted the *baiulus* executive functions.⁵⁰ In other places, such as the royal domains in France, we find that the royally appointed and regionally functioning *bailli* received sentencing functions in addition to their executive functions comparatively early in the thirteenth century, particularly with regard to appeal cases.⁵¹ Corresponding functions were held by the Aragonese *alcalde* who according to the Vidal Mayor were to be appointed throughout the entire realm from around 1247.⁵²

In the following three decades in Denmark, the ombudsman received increased powers—as we can see in the third book of Eric's Law for Sjælland—so that he now became able to initiate cases for others and in some cases even act as a public prosecutor if the court allowed it, a privilege that was confirmed by the later Thord's Articles.⁵³ He was also given better possibilities of enforcing the payment of fines and, at the same time, he was to ensure that cases that were initiated were pursued to the end. Thus the ombudsman, in reality, became the one

⁵⁰ See Andersen, *Lærd ret og verdslig lovgivning* (PhD thesis), pp. 164–166.

⁵¹ John W. Baldwin, *The Government of Philip Augustus. Foundations of French Royal Power in the Middle Ages* (Berkeley, Los Angeles and Oxford, 1991), pp. 125–144.

⁵² Andersen, *Lærd ret og verdslig lovgivning* (PhD thesis), pp. 228–229.

⁵³ Thords Art. 59.

person in court who oversaw every activity and ensured that justice was achieved.

The kind of ombudsman who in thirteenth-century Latin terminology was named *exactor* was commanded in the following century to appoint a local freeman to be his subordinate assistant, a so-called *official*, and the ombudsman was henceforth known as an *advocatus*,⁵⁴ probably in acknowledgement of the close ties that he had to the institution of royal power.⁵⁵ At this time, the phrase *advocatus* designated a person who, on behalf of the king, supervised an area of authority of a certain size. This area was designated in the Law of Jylland as a *len*,⁵⁶ for which reason this official's title changed into *lensmand* while his official in time was exclusively referred to as the *foged* (which for a period in fact also covered the office of the ombudsman/*lensmand*!) with reference to the *herred* in which he functioned. The office of the ombudsman developed into the office of *lensmand*⁵⁷ while the local freeman of a certain wealth, who the ombudsman was authorised by the Law of Jylland to appoint as his substitute in the *herred*,⁵⁸ developed into a separate office, namely that of *foged* (i.e. bailiff). Neither the terminology nor the geographical extent of the office developed consistently. Well into the sixteenth century widely different terms, such as court auditor, court executive, court *foged* or local court auditor, were used to designate the *foged*,⁵⁹ and while the local official became a fixture in local courts in Skåne around 1350 the same development only took place in Fyn in 1400 while Sjælland and Jylland finally followed during the reign of Eric of Pomerania (r. 1412–1439). This skewed development must be connected with the fact that a large

⁵⁴ DD 2:8:176, § 33 (1320), and DD 2:9:273, § 35 (1326).

⁵⁵ Concerning terminology as it is outlined in the following, see Jørgensen, *Dansk Retshistorie*, pp. 349–350; Herluf Nielsen, "Lensmann, Danmark", *KLNM* X, cols. 506–509; Herluf Nielsen, "Fogde, Danmark", *KLNM* IV, cols. 462–465; Lerdam, *Kongen og tinget*, pp. 235–239.

⁵⁶ JL II 53, II 88 and III 3.

⁵⁷ A good example of this pluralism of terms is found in Christian III's Copenhagen Recess of 1547, where there is a single mention of the *lensmand* as an ombudsman, see SGDL 4, pp. 214–236, § 12.

⁵⁸ JL II 55.

⁵⁹ See for example Rep. 2:1:1138 (1460); Rep. 2:1:1430 (1462); Rep. 2:1:1590 (1463); Rep. 2:1:1628 (1463); Rep. 2:1:1663 (1463); KB 1550–55, p. 60 (1551); KB 1550–55, p. 166 (1552). It is a common feature of transitional phases of the Middle Ages to find such a pluralism of terms, see for example the situation around 1200 concerning the French *bailli*, see Baldwin, *The Government of Philip Augustus*, pp. 125–136, or the Aragonese *iusticia*, see Andersen, *Lærd ret og verdslig lovgivning* (PhD thesis), p. 225.

part of Valdemar IV's reign (r. 1340–1375) was spent re-establishing control over royal manors, which had been providing collateral for loans from foreign, mainly German, princes. Thus it was the commanders of the royal castles across the realm who frequently oversaw and presided over the local courts in the castle's vicinity.⁶⁰

Having been a possibility, during the fourteenth century, and countrywide by the beginning of the fifteenth century, it became the duty of the *lensmand* to appoint on behalf of the king a local official/*foged*. This duty was emphasised time after time in royal charters and recesses.⁶¹ As early as the fourteenth century these officials were appointed with strict instructions that misuse of the office would lead to dismissal and prosecution before the king.⁶² This was explicitly emphasised by the fact that the newly appointed *foged* was to produce an oath to the *lensmand* acting as the representative for the king that he would act according to law and equity.⁶³

Background, Requirements and Salaries

There were several demands of the incumbent *foged*. Firstly, he had to be resident in the *herred*; any exception from this rule was caused by very specific circumstances.⁶⁴ The office was thus closely associated with the geographical boundaries of the *herred* and the *foged*'s presence within these boundaries. While this was not the case in other European realms because central power feared that the incumbent could find himself sharing interests with the local community or let himself be guided by self-interest,⁶⁵ the Danish central administration did not allow non-resident *foged*.

⁶⁰ Lerdam, *Kongen og tinget*, pp. 240–249.

⁶¹ DD 2:8:176, § 33 (1320); DD 2:9:273, § 35 (1326); DRL 1:31, § 34 (1376); DRL 3:1, § 14 (1513); DRL 3:13, § 35 (1522); SGDL 4, pp. 214–236, § 5 (1547); CCD 1:1, § 6 (1558), CCD 1:11, § 32 (1559).

⁶² DD 2:5:310, § 9 (1304); DD 2:8:176, § 33 (1320); DD 2:9:273, § 35 (1326); DD 3:4:131, § 11 (1354); DRL 1:31, § 35 (1376); DRL 2:13, § 2 (1442); DRL 2:24, § 2 (1455); DRL 2:30, § 12 (1466); DRL 3:1, § 14 (1513); SGDL 4, pp. 214–236, §§ 5 and 7 (1547); CCD 1:1, §§ 6 and 9 (1558); CCD 1:11, § 32 (1559).

⁶³ See for example DRL 3:13 § 35 (1522); SGDL 4, pp. 214–236, § 6 (1547).

⁶⁴ For a later reiteration of this, see KB 1603–08, pp. 501–502 (1606); CCD 3:460 (1617); KB 1621–23, pp. 595–596 (1623); KB 1627–29, p. 126 (1627); KB 1633–34, p. 98 (1633); KB 1637–39, p. 204 (1637); CCD 5:143 (2:6, § 9) (1643).

⁶⁵ For example Baldwin, *The Government of Philip Augustus*, pp. 125–136, on France, and Andersen, *Lærd ret og verdslig lovgivning* (PhD thesis), p. 162, on Sicily.

Secondly, there was an increased emphasis on the need for the *foged* to be of good record⁶⁶ (and obliged by Christian II's Land Law to attend Mass before sitting in judgement).⁶⁷ From time to time there may have been problems with this and therefore post-Reformation Denmark saw several attempts to ensure that the *foged* remained of good record, amongst other means this was achieved by the *lensmand* nominating a replacement for the official to avoid conflict of interest if the *foged* was a party in a case⁶⁸ or by registering an annual report in which the *foged* accounted for his activities by providing a list of culprits, members of the court, etc. to the *lensmand*.⁶⁹

Despite these measures the reality remained that many *fogeder* did not meet the requirement of being or remaining of good record because even in the seventeenth century when central administration had tightened control we find that *fogeder* transgressed. There are examples showing that a *foged* might initiate a case in which he subsequently passed sentence, or be involved as a party in a case, or indeed be culpable, and that *fogeder* overall abused their position by being biased or reluctant in their decisions and in some cases even seized land without proper legal authority. Some *fogeder* were accused of having difficulty in staying away from women or other people's possessions and they were neither reluctant to defame others nor indeed gaol pregnant women.⁷⁰ That such actions were hardly new is evidenced by their being mentioned in the last part of Eric's Law for Sjælland.⁷¹

Thirdly, it was necessary for the *foged* to possess goods to the value of three marks so that he was able to legally defend himself if necessary.⁷² This financial bar meant that the official possessed a certain socio-economic standing in society and therefore a proportion of

⁶⁶ This is found most explicitly in the Koldingske Recess from 1558, see CCD 1:1, § 6. Ethical demands of judges are already known from the learned law of the High Middle Ages and were soon implemented in areas where learned law dominated, such as Sicily, see Andersen, *Lærd ret og verdslig lovgivning* (PhD thesis), p. 162.

⁶⁷ DRL 3:13, § 49.

⁶⁸ See for example KB 1576–79, pp. 107–108 (1576).

⁶⁹ SGDL 4, pp. 172–189, § 6 (1537); SGDL 4, pp. 214–236, § 10 (1547); CCD 1:1, § 20 (1558).

⁷⁰ Andersen, *Studier i dansk proceshistorie*, pp. 140–141.

⁷¹ See also Miss. 1:250 (1504); Miss. 1:329 (1511); Miss. 1:382 (1512).

⁷² This amount is emphasised in JL II 55 (1241) and DD 2:9:273, § 35 (1326). But it was still a demand that the *herred's foged* was to have sufficient wealth to defend himself, see for example the case from 1588 in which the king discharged an *foged* because he was “not sufficient to sit in that calling because he has only little to provide surety” and therefore he was “not suitable for such an office”, see KB 1584–88, p. 907.

fogeder was recruited from the gentry, although from the fourteenth century on the majority were land-owning freemen.⁷³ In some areas it is apparent that it was difficult to find suitable candidates as a consequence of the large social and economic changes brought about by the plague, agricultural decline and the steady erosion of the estate of land-owning freemen.

There may be another reason why the *foged* needed to be wealthy, however modestly. Sixteenth-century sources reveal that they were both poorly and infrequently paid, although it is not possible to say anything about how officials were remunerated before this time. The sixteenth century saw four kinds of remuneration. *Fogeder* could be exempt from taxes and dues—in some cases even benefit from a share of the tithes.⁷⁴ He could be given land or lodgings for free.⁷⁵ A plaintiff was obliged to pay a fixed amount to the *foged* involved in his case (so-called *fogedpenge*—official's money) or the plaintiff paid for individual legal transactions such as publication, transfer of property and such like,⁷⁶ or—as seems to have been the preferred solution of the central administration as evidenced by the rules of Christian II's 1522 Land Law—all land-owning freemen in the court's jurisdiction were to pay a bushel of corn to the judge.⁷⁷

Relief from taxes and dues seems to have been the most common way of remunerating the *foged* in the later part of the investigated period,⁷⁸ closely followed by litigants paying for the services provided by the

⁷³ Lerdam, *Kongen og tinget*, pp. 238–239; Ole Færch, *Herredsfogeder og skrivere ved Hornum herredsting, Nibe og Nørholm birketing samt Hornum-Fleskum herredsting* (Aalborg, 2006), pp. 7–29. This apparent fact is manifestly connected to the social development mentioned below, which for a century after 1340 led to an increase in the proportion of peasants who actively engaged in litigation, see Lerdam, *Kongen og tinget*, pp. 249–252.

⁷⁴ See for example KB 1556–60, p. 324 (1559); KB 1571–75, p. 4 (1571); KB 1571–75, pp. 115 and 152 (1572); KB 1571–75, pp. 409, 412 and 462 (1574).

⁷⁵ See for example FFR pp. 428–429 (1532); KB 1556–60, pp. 42–43 (1556); KB 1556–60, pp. 257–258 (1559); KB 1556–60, p. 429 (1560). In thirteenth-century Normandy the French king rewarded his *baillis* with property rights, which made them comparatively important players in their region, see Baldwin, *The Government of Philip Augustus*, pp. 220–225. Such a development is not known in Denmark concerning the *herred's* officials, but is discernable concerning *lensmænd*.

⁷⁶ For example DRL 3:13, § 59 (1522); KB 1561–65, p. 412 (1564); KB 1571–75, p. 698 (1575).

⁷⁷ DRL 3:13, § 36.

⁷⁸ See Stefan Persson, *Kungamakt och bonderätt. Om danska kungar och bönder i riket och i Göinge härad ca. 1525–1640* (Göteborg and Stockholm, 2005), p. 226, which is based on the accounts for Göinge *herred*.

foged (and for that matter his scribe). In 1564 peasants in Ringsted *herred* on Sjælland were told that each free landowner in the *herred* “who seeks their rights at Ringsted *herredsting*” was commanded to pay the *foged* one bushel of oats because the incumbent *foged* had so far received nothing and therefore demanded “either to be relieved of his office or to be paid therefore.”⁷⁹ This was not an unusual solution: “since *fogeder* in other *herreder* also receive help from freemen” as we find in a document from 1575.⁸⁰ It was only later that remuneration took the form of relief from taxes or salaries.⁸¹

We can conclude from the many exemptions that were granted to incumbent *fogeder* that holding the office did not exempt the incumbent from ‘roping’, i.e. the duty to function as an assessor, during his term of office.⁸² For this reason the un-salaried *foged* could find himself in the situation that he spent much time travelling across the *herred* as an assessor, and this may have been the background to the insistent refusal of a freeman who declined the office of *foged* around 1580, even to the point of sustaining a fine of one hundred *daler*, a huge amount, for ignoring the king’s command.⁸³

Not enough documentations survives from the late Middle Ages to establish how long local *fogeder* held office, but according to post-Reformation sources it is clear that some individuals had turned officialdom into a life-long occupation, with examples of some with more than twenty years of experience or a son following his father in the office. There are also examples of local *fogeder* in two neighbouring *herreder* being from the same family. There are no identifiable ‘legal dynasties’, but we may speculate that once a *lensmand* found a good competent *foged* he would be more likely to nominate his kinsmen for the office if it such a post became vacant nearby. He may even have consulted with his *foged* to find suitable candidates, possibly even doing so in the forum of the *ting*. In his coronation charter of 1513, Christian II admitted that he did not have the competence to put a

⁷⁹ KB 1561–65, p. 412 (1564).

⁸⁰ KB 1571–75, p. 698 (1575).

⁸¹ Andersen, *Studier i dansk proceshistorie*, pp. 142–143. This is in contrast to thirteenth-century France where knights were recruited as *baillis* through a clear economic policy, see Baldwin, *The Government of Philip Augustus*, pp. 125–136.

⁸² See for example KB 1550–55, p. 323 (1554); KB 1566–70, p. 562 (1570); KB 1584–88, pp. 848–849 (1587).

⁸³ See the unique case in KB 1576–79, pp. 456 (1578) and 771 (1579), and KB 1580–83, p. 296 (1581).

time limit on the period that a *foged* served.⁸⁴ This admission probably signals the fact that *lensmænd* and local *ting* had a certain measure of influence over recruitment to and duration of the office.⁸⁵ Thus we do not see the same tendency in Denmark to make lifelong appointments that we see in France in the thirteenth century where the permanence of the *foged* facilitated a better coordination between royal courts and local courts in royal domains.⁸⁶

Court President, Administrator and Judge

It was with good reason that local society was interested in the incumbent for, from the end of the fifteenth century, many *fogeder* seem to have had administrative tasks beyond the exercise of law and presidency of the local court.⁸⁷ After the Reformation these tasks might consist of the recovery of debt, taxes and customs and the responsibility for building bridges over dangerous fords, etc.⁸⁸ The *foged* could thus play an important role, for example the right to secure possession of property for the successful party in a court case was delegated by the central administration in the first instance to the provincial court in Sjælland and then to the local *ting*.⁸⁹ After the Reformation, however, it was made explicit that the *foged* was not to serve the function as executioner when, for example, a thief was to be executed for his felony. This was left to the professional executioner, who was supposed to be found in every borough.⁹⁰ The reason for this was probably

⁸⁴ DRL 3:1, § 17.

⁸⁵ Andersen, *Studier i dansk proceshistorie*, pp. 143–144.

⁸⁶ Baldwin, *The Government of Philip Augustus*, p. 37. In practice this happened by introducing the new office of *bailli* in preference to the previous geographically founded office of *prévôt*, see pp. 43–44, 125–126.

⁸⁷ Lerdam, *Kongen og tinget*, pp. 237–238.

⁸⁸ For these, see SGDL 4, pp. 190–197, § 6 (1539); SGDL 4, pp. 214–236, § 34 (1547); KB 1550–55, pp. 191 and 196 (1552); CCD 1:1, § 54 (1558); KB 1566–70, p. 19 (1566); KB 1566–70, p. 307 (1568).

⁸⁹ Lerdam, *Kongen og tinget*, p. 253. At a later date this was carried out by the courts announcing 12 so-called 'law hearings' or 'knights' men's men' to ensure that the transfer of the estate took place in accordance with the sentence, see Andersen, *Studier i dansk proceshistorie*, p. 144, n. 133.

⁹⁰ The *herred's foged's* role in cases of capital punishment, for example for theft, was outlined in the recess of 1551 and repeated by the Koldingske Recess of 1558, see both SGDL 4, pp. 237–246, § 5 (1551), and CCD 1:1, § 13 (1558), in which we find that the *foged* must announce the sentence and seal it with his personal seal and the seals of eight good men. For examples that this rule was implemented immediately, see KB 1556–60, p. 124 (1557) and KB 1588–92, pp. 363–364 (1590).

that the office of executioner was regarded as a dishonest occupation, which meant that if the *foged* was also the executioner his status in local society would be compromised.

Presiding over the court remained the most important task, and in time the pronouncement of sentences came to be seen as almost as important. It is difficult to say anything concrete about either the *foged*'s transformation from being 'only' the leader of the court to being its judge or the associated development of terminology. Based on a study of the sparse sources, Henrik Lerdam suggests that the *foged* was originally not formally the leader of the *ting* and court transactions but that he developed into this in time because the sources mention the *lensmand*'s *official* (the Latin term) but not his tasks. This development came about as a consequence of the central power's work to centralise and secure a proper administration of justice and its consequential change in demands of proof in court procedure during the thirteenth century.⁹¹ In a proof of court actions from the local court in Ars issued during the summer of 1388 we learn that the *foged* "conducts the actions of the court",⁹² but according to a letter issued by the *foged* in Lille *herred* from 1418 this did not mean much more than that the local *foged* made sure that procedure was correct since, according to the letter, it is obviously the twelve men in the jury that decided whether the defendant was guilty.⁹³ It was not until a statute of 1466 issued by Christian I that it was explicitly stated that *fogeder* were to "seyæ dom ok halde tingh rætfærdugh" ("speak dooms and hold court justly").⁹⁴ But this did not mean that the *foged* henceforth decided cases alone (or at all) because the *foged*'s power to pass sentence (and his title of judge), in the words of Poul Johs. Jørgensen, "was still very uneven."⁹⁵ Jørgensen's analysis is quite correct if we analyse further the sources that mention the *foged* in a role similar to that of a judge or as a leader of the court because this material leaves us with an impression of a very uneven development.

Fifteenth-century sources give us evidence indicating that: the *foged* had a leading role in ensuring correct procedure, that there was a 'judge' at the local *ting*, and that the *ting*'s power to pass decisions in

⁹¹ See Lerdam, *Kongen og tinget*, pp. 236–237.

⁹² DD 4:3:417.

⁹³ Rep. 1:3, p. 242 (1418).

⁹⁴ DRL 2:30, § 12.

⁹⁵ Jørgensen, *Dansk Retshistorie*, p. 507.

individual cases did not demand the presence of the *foged*. We find examples of the first statement in a case mentioned in 1478 in which the *foged* nominated one man from the *herred* to nominate eleven other men who had appeared in court to make up a jury with him as the twelfth members.⁹⁶ This adds weight to the impression gained from the cases mentioned above dating from 1388 and 1418. In addition, one of the chapters of the corpus of legal norms known as *Rigens Ret* dating from the 1450s that outlined the customary law of the realm says that a sentence had to be introduced by the judge's name followed by the names of the others who put their seal to the sentence, the so-called "best men appearing".⁹⁷ Two legal appeals dating to 1447 and 1470 contain the information that the previous sentence, which concerned disputed properties, had been decided by a man who "had full power to convene the *herredsting* and sit in the judge's seat at that time."⁹⁸ A decision made in 1481 contains a more thorough description of the 'judge's' role. This document describes in detail how the plaintiff presented his case and the defendant replied, followed by a supplementary question asked by the judge of whether both parties were ready to stand before the court. The parties agreed to this, after which the judge conferred with the good men who were present at the court and instructed the parties that they were to appear "again in a fortnight if you cannot agree." A fortnight later, they appeared before the *ting* to hear the final judgement by the judge, which was pronounced after his consultation with the members of the court who had appeared at that session.⁹⁹ The third point is illustrated by two cases from the middle of the century in which one member of the court selected eleven others from those present at the court, presumably without having being asked to do so by the *foged* since the latter is not mentioned in the document, after which the selected jury briefly left the court to discuss the matter and returned with a decision.¹⁰⁰

⁹⁶ Rep. 2:2:4233 (1478). In an earlier case it was apparently the *lensmand* who presided in person when "the royal *foged* [demanded] a *Stokkenævn* consisting of 12 Danish men" to witness a transfer of property in 1444. See Rep. 1:3:7407.

⁹⁷ Da Dom VII, pp. 346–433, § 26. See also § 30.

⁹⁸ Rep. 1:3:7692 (1447); Rep. 2:2:2781 (1470).

⁹⁹ Rep. 2:3:4895.

¹⁰⁰ Rep. 2:1:780 (1457); Rep. 2:1:1070 (1460). In Rep. 1:3:7692 from 1447 we find that the 'herredstingmand' was requested (probably by the *foged*) to nominate the other 11.

If we study the post-Reformation sources it is necessary to adjust our picture of the *foged* slightly. We now only find a few indications that the *foged* might have a leading role in securing proper procedure without possessing sentencing powers, in a letter patent dated 1574 addressed to the *foged*, the judge's assistants and the sages in Gydinge (Göinge) *herred* in Skåne concerning their duty to appear before the provincial court in Lund if their decision was appealed and in another letter patent from 1581 that makes it clear that the local scribes in Skåne must put their seal to proofs of court action and sentences together with the officials, i.e. *fogeder*.¹⁰¹ In both cases it is not possible to be sure that these texts mean that the *foged* did not participate in the decision itself because the mention of him in the letter to the inhabitants in Gydinge allows the interpretation that he at least had to witness the correctness and therefore had a share in the decision (for this reason he could be summoned to the provincial court). In other sources mentioning the *foged* he has sentencing powers. In most cases he is indeed called 'judge' (in some unusual cases even the 'judge of the *herred*') and this is consistently the case in royal legislation¹⁰² although directions concerning particular cases explicitly say that the *foged* decides them.¹⁰³ However, in some cases, according to the law, he was supposed to pass sentence with other good men who were his assistant judges¹⁰⁴ (which previously had been a common occurrence in other parts of Europe).¹⁰⁵ In some cases his assistant judges were

¹⁰¹ CCD 1:713 (1574); CCD 2:245 (1581). In Christian III's Copenhagen Recess from 1547 the ombudsman (sic), taking the advice of the *herred's* men, was required to appoint an unbiased individual to nominate a *herred's* jury if the defendant was required to defend himself by this means, and although the ombudsman—who then was the *lensmand*—most likely appointed the *herred's* official to do this, the latter, according to this recess, clearly wielded sentencing powers in addition to executive powers. See § 16 for other cases of this.

¹⁰² DRL 3:13, §§ 39, 40, 49, 50, 55, 56, 58, 59, 61, 66 and 67 (1522—in these cases he is most frequently referred to as the *herred's* judge); SGDL 4, pp. 214–236, §§ 7, 8 and 10 (in which the judge and the *herred's foged* share the same duties) (1547); SGDL 4, pp. 237–246, §§ 5 and 13 (1551). See also CCD 2:43, § 5 (1576).

¹⁰³ FFR, p. 354 (1531); KB 1556–60, pp. 72 and 124 (1557); KB 1561–65, p. 202 (1562).

¹⁰⁴ DRL 3:13, §§ 35, 39, 57 and 58 (1522); SGDL 4, pp. 237–246, § 5 (1551); CCD 1:1, § 13 (1558); KB 1550–55 pp. 45 (1551), 301 (1554) and 329 (1554).

¹⁰⁵ During the thirteenth century the royally appointed local judge in Aragon was required to consult representatives of the local community, see Andersen, *Lærd ret og verdslig lovgivning* (PhD thesis), pp. 225–227.

laymen, in others they were members of juries.¹⁰⁶ It is clear that from the beginning of the sixteenth century the *foged* did not just preside over the court but was also part of the group of members who had sentencing functions. In spite of this we have a few mentions that indicate that it was not necessary for the *foged* to be present in order for a decision to be made in a case. In a case dating from 1560 in Øster herred in Blekinge, the twelve men who were to pass sentence in a particular case were instructed to provide a written record of their decision and in another case from the herred of Hindsted dating from 1564 a man was sentenced by good men because of the witness given by two named men and 24 anonymous men.¹⁰⁷ However, it is very likely that Blekinge, which was a province on the boundary between Denmark and Sweden, was a particularly disturbed part of the country, for which reason we have to take into account the possibility that this was the reason for the *foged*'s absence.

Seventeenth-century sources on the other hand show beyond a doubt that the *foged* had a sentencing function. Those documents that mention a legal decision refer in every single case to the fact that the *foged*, on his own, passed sentence or was going to pass sentence, and this was to take place in consultation with eight jurors or assistant judges. The impression of the *foged* acting as sole judge stems from both legislation and practice while the situation where he was assisted by eight jurors is mentioned in a minority of cases.¹⁰⁸

The sentencing powers of the *foged*—whether he passed sentence on his own or with assistant judges—depended on which legal jurisdiction heard the case. If the case concerned property rights according to the provincial laws a local jury of elders could swear an oath concerning the matter, while some criminal cases, in time, required the assistance of the *foged*. Poul Johs. Jørgensen argues that the decision to have assistant judges in certain serious cases should be seen as an expression of the fact that sixteenth-century Danish central administration wished to secure that the *foged* did pass sentence in difficult cases—if

¹⁰⁶ In Christian II's Land Law from 1522 it was decided that *sandemænd* and juries were not longer to swear in cases where the charge was the planning of a homicide. These were in future to be examined by the provincial judge together with the best men, see DRL 3:13, § 57. As mentioned before, this law did not have much impact since it was rescinded at the deposition of Christian II in 1523.

¹⁰⁷ CCD 1:29 (1560); KB 1561–65, pp. 380–381 (1564). See also CCD 2:540 (1590) concerning oaths by *sandemænd*.

¹⁰⁸ Andersen, *Studier i dansk proceshistorie*, p. 148.

he were to do this on his own he might dodge his responsibility and refuse to pass sentence without valid reason.¹⁰⁹

The question has not been thoroughly investigated yet and it is difficult to do so since cases that were not heard do not leave traces in the material, but Knud E. Korff has shown that in the seventeenth century the *foged* of Aasum *herred* was relatively free to choose his decision from the premise of what was likely to be the least controversial with regard to the status of the parties involved and in proportion to what was most useful to the local community. What was most useful to the local community could often be agreed in a settlement despite clear legislation to the contrary, but the *foged* does not seem to have acted in direct contravention of statutes or legislation when his decision became necessary. In other words, he did not attempt to bend the rules of law to reach his decision: local *fogeder* in seventeenth-century Aasum appear to have acted sensibly with a reference to their responsibility and in accordance with the boundaries provided by legislation and central administration in cases when a settlement could not be agreed between the parties.¹¹⁰

It is not possible to reject Poul Johs. Jørgensen's thesis that the *foged* needed to use assistant judges to ensure that he passed sentence, but on the other hand there was a common tradition in Denmark and other European kingdoms¹¹¹ that the local community participated in the administration of justice in order to secure local support for those decisions that were made in specific cases, and this tradition seems not to have changed significantly in the Danish provincial laws as well as in the post-Reformation recesses. The sixteenth and seventeenth centuries may have been characterised by increased centralisation, standardisation and a general tightening of the local administration of justice and its institutions, but customary (and for that matter also statutory) traditions were not easily changed. In practice, it was necessary to have the support of the local community to ensure a broad consensus about the correct decisions made. This was necessary in order to ensure the carrying out of a legal decision in serious cases. The *foged* may have become a sole judge, but he could only exercise that office to the extent

¹⁰⁹ Jørgensen, *Dansk Retshistorie*, pp. 507–508.

¹¹⁰ Korff, *Ret og pligt i det 17. århundrede*, p. 207.

¹¹¹ For example in Aragon, see Andersen, *Lærd ret og verdslig lovgivning* (PhD thesis), pp. 226–227.

that his surroundings accepted it and supported the execution of the judgements that had been passed.¹¹²

Documenting the Activity of the Court—The Court Scribe

During the same time that the *foged's* office began its development towards becoming a judge in the fifteenth century, we find sporadic mention of the local scribe of the *herred*,¹¹³ but it is only after the Reformation that we find them more extensively mentioned. This development coincides with the demand by Christian III in the Dronningborgske Recess of 1551 that each court scribe must have a court act book. This was to contain all sentences, deeds, depositions and other written submissions to the court “*mett same breffues dato*” (“with the dates of same letters”) and warned that the scribe would be punished as a forger if he intentionally copied down something that was not true—for after the scribe’s death his act book was to be preserved carefully so that it would be possible to return to it and consult about what had transpired or had been negotiated in the *ting*.¹¹⁴ Thus the demand first formulated by the Fourth Lateran Council that court acts be taken down in writing was finally and formally introduced into Danish courts.

Background and Salaries

Keeping a record of court actions naturally demanded that a scribe was present at every meeting of the court, but the idea was not new in 1551. In the Land Law of 1522 Christian II demanded that his *lensmænd*, assisted by the local *fogeder*, were to appoint and receive an

¹¹² The picture of a local community that sought consensus is supported by the village statutes that were increasingly written down from the second half of the seventeenth century, see Jørgensen, *Dansk Retshistorie*, pp. 124–126, 481–482. The motivation for writing down rules about how individual villages should solve internal conflict was of course to ensure consensus about how to avoid the involvement of the nobility in disputes—usually by means of a settlement. It does not seem likely that the village courts’ decisions were challenged at local *herred's* courts. These appear to have accepted the principle that a village could solve its own internal conflicts, see Hans Henrik Appel, *Tinget, magten og æren*, pp. 243–251.

¹¹³ See Færch, *Herredsfogeder og skrivere*, pp. 30–40; H.K. Kristensen, “Skast herreds ting, fogder og skrivere”, *Fra Ribe Amt* (1956–59), pp. 212–246, esp. 240–243.

¹¹⁴ SGDL 4, pp. 237–246, § 3.

oath from scribes in each *herred*.¹¹⁵ It is natural to assume that these scribes were clerics because among the composers of the oldest proofs of court actions in Skast *herred* are several priests and these were most likely also among the few who could write.¹¹⁶ In a late entry in the act book from 1637 we learn that only two out of eight participants at the court could read or write and therefore take over the job of the scribe on a day when the scribe had not appeared to do his job.¹¹⁷ In 1622 the central administration sent a missive to the bishop of the diocese of Sjælland clarifying that deacons could not be court scribes—an occurrence that had happened in several local courts.¹¹⁸ This indicates that even in the seventeenth century it was not always easy to find a man who could both read and write and who was also interested in being the local *ting* scribe.¹¹⁹

After the Reformation there are several indications that there was still a long way to go before all local *ting* had their own scribe. In some cases the *foged* appears to have written entries into the act books,¹²⁰ and during the sixteenth century the central administration repeatedly demanded that the court scribe should affix his seal to all sentences, proofs of court actions, etc. in order to ensure that the *foged*—who might not even be able to read and write and therefore left this job to the scribe—was not able to forge these.¹²¹ In some cases it also meant that the scribe could be summoned to the provincial court to explain a contested sentence.¹²²

This undoubtedly made it more difficult to recruit scribes locally, but their uncertain reward may also have played a part. According

¹¹⁵ DRL 3:13, §§ 35 and 40. This was repeated in other contexts, see for example KB 1649, pp. 253–255, § 7, and a letter of attorney from 1593, see CCD 2:618.

¹¹⁶ Kristensen, *Skast herreds ting, fogder og skrivere*, p. 240.

¹¹⁷ Skast 1637:253. For examples of these members of the court working as scribes, see Skast 1638:335; Skast 1640:14; Aasum 1648:80 and 149. If the court scribe was absent the court could be cancelled—as was also the case if the *foged* did not appear—because in such cases the court could not be held according to correct procedure, see for example KB 1630–32, pp. 765–766 and 899 (1632). If the scribe did not have valid reasons for his absence he could lose his office, but in a successful appeal from 1632 a court scribe was found innocent since there was no entry in the court book noting his absence (sic!), see KB 1630–32, pp. 765–766.

¹¹⁸ KB 1621–23, p. 105/CCD 3:588 (1621).

¹¹⁹ See Andersen, *Studier i dansk proceshistorie*, pp. 151–152.

¹²⁰ See CCD 1:29 (1560), KB 1571–75, pp. 91–92 (1571); KB 1588–92, p. 742 (1592).

¹²¹ KB 1580–83, p. 295/CCD 2:245 (1581); KB 1580–83, p. 601 (1583).

¹²² See for example KB 1550–55, p. 301 (1554).

to Christian II's Land Law of 1522 they were to be paid fixed sums for legal documents, and although these were sometimes adjusted in line with inflation, a scribe faced much uncertainty about how much money he could expect for his work.¹²³ In time, some locations gained the privilege that the local scribe was to be free of certain taxes on their farms,¹²⁴ in other cases it was allowed for the scribe to hold similar positions in nearby *herreder* or as a scribe for a peculiar *ting*. There are also some examples that show that the central administration secured the smooth running of scribal work by appointing the scribe for the duration of his lifetime¹²⁵ or letting a son follow his father in the position.¹²⁶

Task: to Write Sentences and Keep the Act Book Properly

In addition to his duty to maintain the act book, which had become a standard part of the tasks of scribes by the time of Christian III's recess of 1551, the royal recesses from the first half of the century charged him with the tasks of taking down sentences in writing and keeping a record of fines that had not yet been paid;¹²⁷ writing down depositions (and when necessary visiting and interrogating witnesses who were ill);¹²⁸ recording people who were sentenced for perjury or false depositions and sending names and depositions to the *lensmand*. The *lensmand* was charged with publishing the names and punishing the transgressor to the full extent of his property at the next meeting of the local *ting* if it was the first time he had transgressed and with exile

¹²³ For details of the changing fees, see for example DRL 3:13, § 40 (1522); CCD 2:43, § 6 (1576).

¹²⁴ See for example KB 1566–70, p. 541 (1570); KB 1571–75, pp. 216 and 259 (1573).

¹²⁵ See for example KB 1566–70, p. 444 (1569) and a reluctance to depose the scribe can be found in KB 1571–75, p. 19 (1571).

¹²⁶ Andersen, *Studier i dansk proceshistorie*, p. 152.

¹²⁷ DRL 3:13, § 48 (1522). Apparently there were frequent problems with this because we regularly find reminders that sentences were to be delivered in writing, see for example KB 1556–60, p. 412 (1560) and KB 1588–92, p. 101 (1588).

¹²⁸ DRL 3:13, §§ 66–67 (1522). This may have made scribes keep copious notes to ensure that a deposition was sufficiently detailed. The central administration demanded in an open letter in 1593 that the court book was only to contain excerpts of the parties' arguments if these arguments were not too extensive, see KB 1593–96, p. 15/CCD 2:602.

if it was the second time—and if it was the third time the transgressor was to have two fingers cut off.¹²⁹

The latter rule was repeated in the Koldingske Recess of 1558, which also stated that when the scribe died the act book was to be kept securely, either in the main church of the *herred* or in its treasure chest.¹³⁰ In addition, the central administration found itself forced to remind scribes, *fogeder* and *lensmænd* that they had a responsibility to do this¹³¹ together with a reminder that depositions, sentences and letters that were published or read out in court were to be entered into the act book. That this was necessary is evidenced by the fact that it is common to find examples of non-compliance with these rules or obviously fraudulent entries.¹³²

The regulations regarding scribal duties, abilities and rewards do not in themselves mean that there were scribes in the realm before the sixteenth century. The increased literacy across all classes adds weight to the impression that there was a certain level of scribal activity, at least by the second half of the fifteenth century. The development in the sixteenth century shows that the spread of literacy had been somewhat haphazard in the Danish legal system because it was only after the Reformation that the regulation began seriously and it became possible to take issue with or investigate scribal activity. In this respect the Danish administration of justice was somewhat late in its introduction of literacy.

Voting and Decision—The Jurors

As we learned in my analysis of the *foged*, over time the leader of a local district court gained increased powers to decide cases without reference to the opinion of the group of men he had appointed as jurors. But it was also clear that the *foged*—or the judge as he came to

¹²⁹ SGDL 4, pp. 190–197, § 2 (1539); SGDL 4, pp. 214–236, § 8 (1547); also repeated in SGDL 4, pp. 237–246, § 13 (1551) and later, see below.

¹³⁰ See CCD 1:1, § 16, and concerning the latter § 11.

¹³¹ See for example KB 1576–79, pp. 329–330/CCD 2:99 (1578); KB 1588–92, p. 55/CCD 2:489 (1588); KB 1588–92, pp. 681–682 (1591). The *lensmand's* possible responsibility could in some cases result in his correcting the scribe's entries, see Jens Chr. V. Johansen, "Den danske adel og retsvæsenet 1537–1660. Landsting og kongens retterting", eds. Per Ingesman and Jens Villiam Jensen, *Riget, magten og æren. Den danske adel 1350–1660* (Aarhus, 2001), pp. 557–575, esp. 557.

¹³² Andersen, *Studier i dansk proceshistorie*, pp. 154–157.

be known in many recesses and letters issued by the central administration—sought the assistance of a group of assistant judges or jurors well into the post-Reformation period and that he passed sentence in accordance with their opinion. Thus the jurors' decisions still played a significant role in the administration of justice, although they were probably on their way to being wound down in favour of a single judge at both first- and second-instance courts.

Sandemænd

Among the jury institutions that were active, the *sandemænd* are, as mentioned in part 1 above, the ones that have attracted the most interest from legal historians. We may guess that this is because they held the office for the duration of their lives and because of the kind of transgressions that they were supposed to decide. The criminal transgressions against the law that *sandemænd* in Jylland were supposed to examine included the most serious crimes such as homicide, maiming, criminal damage, imprisonment and rape, and the civil cases that they dealt with included disputed boundaries and church property. According to the Law of Jylland, the first type was to be decided at the provincial court while cases concerning boundaries were to be decided *in situ* following an inspection of the disputed lands and the rest of the cases were to be decided in local district courts. In practice, disputed boundaries may have been decided *in situ*, but subsequently this decision was acknowledged or published in the local *ting*.¹³³ In other cases the decision of the *sandemænd* resulted in specific actions, such as for example the establishment of boundary markers between fields.¹³⁴

The Law of Jylland made a number of demands as to the *sandemænd*'s social status, wealth and local standing in the case that they were to decide—they were to be from the specific *herred* in which the transgression against the law had taken place—and from the end of the

¹³³ See for example Rep. 2:1:1950 (1465); KB 1551–1555, p. 314 (1554); KB 1584–88, p. 661 (1587); KB 1652, p. 168 (1652). To claim that the decision had been published in court was not always enough, especially in cases where the appellant could produce copious proof, such as evidence of transfer, of custom, and proofs of court actions, see Rep. 2:5:9175 and 9182 (1500). There are a few examples that boundary cases were decided before the *sandemænd* produced an oath, see for example DD 2:6:474 (1312), in which Duke Eric of Jylland confirmed a decision based on *kønsnævn*.

¹³⁴ See Rep. 2:1:1951 (1465), and the reference to this in several later recesses, see for example SGD L 4, pp. 214–236, § 14 (1547); SGD L 4, pp. 237–246, § 16 (1551); CCD 1:1, § 27 (1558).

thirteenth century they were expected to consult with, or were legally required to pronounce a decision by, those members of the court that had appeared at that session. Thord's Articles from 1304 finalised a development in which two local so-called *fyllingsmænd* were introduced to witness that procedure had been adhered to so that the court could in good conscience force the *sandemænd* to produce an oath, i.e. pass a decision. During the same period the number of wounds that *sandemænd* could sentence a defendant to compensate was reduced, and it thus seems that the members of the local *ting* were successful in several ways in forcing through a limitation of the competences of the *sandemænd*. This is most likely also the reason why the first few decades after the publication of the Law of Jylland saw the *sandemænd* denied a function in cases of counterfeiting, arson and assault and robbery in favour of an ad hoc appointed *herredsnævn* ('jury of the herred') consisting of twelve unbiased local men.

In the very sparse source material from the fourteenth and fifteenth centuries there are only a few mentions of *sandemænd*, but these indicate that the *sandemænd* continued to act as they should according to the Law of Jylland.¹³⁵ Amongst the surviving sources are Thord's Articles, whose composition fell into two periods, 1282–1304¹³⁶ and c. 1450 respectively.¹³⁷ In both cases the Articles do not contribute anything new, but are simply more precise statements of the rules contained in the Law of Jylland. However, the fact that it was necessary to compose these Articles is witness to the fact that it was necessary to restate some of the rules in a more concise form, probably directed at both the *sandemænd* themselves—who were instructed that they had to have six witnesses if they had been illegally and violently prevented from appearing at the court session to pass sentence, in other words at the third meeting of the court in an active case¹³⁸—and at the litigants, for example with the instruction that it was only the culprit who could appeal a decision made by the *sandemænd*.¹³⁹ Furthermore,

¹³⁵ Compare the sources and their interpretation in Jørgensen, "Biskop og bedste Bygdemænd".

¹³⁶ *Sandmænd* are mentioned in this part in § 3, 13, 14, 21, 24, 25 and 30.

¹³⁷ *Sandemænd* are mentioned in § 63, 65, 67 and 72.

¹³⁸ Thords Art. 67.

¹³⁹ Thords Art. 65—this point should have been superfluous since it is unlikely that the winning party had any interest in appealing the decision, but this may also be seen as emphasising the fact that the bishop and the *bedste bygdemænd* could not appear in a case on their own, see Jørgensen, "Biskop og bedste Bygdemænd", pp. 101–105.

the collection known as *Rigens Ret* found it necessary to specify that cases concerning homicide were to be heard at the provincial court,¹⁴⁰ indicating that the procedural rules that were expressed by thirteenth-century legislation might not have been sufficiently clear to have been always obeyed in practice. However, we do not find any mention of *sandemænd* in the fourteenth and fifteenth centuries, which makes one suspect that they did not serve a function in local courts, despite the fact that they were supposed to. In fact, apart from cases of boundaries, largely they do not seem to have become involved in cases,¹⁴¹ not even in a 1433 case from Vindinge *herred* on the island of Fyn in which eight *herredsmænd* sentenced a man to be broken on the wheel as a consequence of his violent behaviour.¹⁴² It is of course possible that this criminal was sentenced for counterfeiting, arson or assault and robbery, in which case he was supposed to be sentenced by the *herredsnævn*, but on the other hand the case shows that as early as the fifteenth century capital punishment could be pronounced in a local court, as was common later on,¹⁴³ for which reason we would expect to see the *sandemænd* appear in the surviving sources—but they do not.

The first time *sandemænd* are mentioned in the sixteenth-century sources is in Christian II's coronation charter of 1513 and in his Land Law of 1522. The rules concerning the *sandemænd* in these normative texts are remarkable because, realistically speaking, they are mainly concerned with limiting the competences of the *sandemænd* so much that they become virtually powerless. In the coronation charter it was stated that the *sandemænd* should no longer produce oaths about real estate and boundaries. Instead these responsibilities were left to the chancellor of the realm in cases of property and knightly men's men (in other words noblemen—compare German *rittermässige Männer*) in boundary disputes.¹⁴⁴ In the Land Law it was stated that *sandemænd* and other juries were not to “suerge eller grandske” (“swear or examine”) in connection with cases concerning intended homicides,

¹⁴⁰ Da. Dom. VII, p. 399, § 20. This had previously entered the law in the Ordinance of Ordeal by Hot Iron, see DD 1:5:96, § 3; SkL 118; JL II 3; ESL II 50.

¹⁴¹ See Rep. 2:2:3287, in which one of the witnesses was simply referred to as *sandemand*, and Rep. 1:3:5090 (1410) and 6016 (1423) as examples of cases that could have involved *sandemænd*, but do not.

¹⁴² Rep. 1:3:6596 (1433).

¹⁴³ See Andersen, *Studier i dansk proceshistorie*, p. 159, n. 226.

¹⁴⁴ DRL 3:1, § 36 (1513). My thanks to Michael H. Gelting for drawing my attention to this.

and later it was stated that all cases that had previously been decided by *sandemænd* and jurors in future were to be decided by a single judge who was usually responsible for the decision,¹⁴⁵ except in cases concerning forest or field boundaries.¹⁴⁶

In reality this meant that the institution of the *sandemænd* was abandoned by Christian II's Land Law in favour of a provincial judge appointed by the king. Such a re-structuring of existing institutions and reduction in popular influence could very well have faced significant resistance, and this is clearly also part of the reason why Christian II faced open discontent amongst a large part of the nobility and the ordinary populace with, amongst other things, public burnings of his legislations.¹⁴⁷ In reality the institution of the *sandemænd* was not abandoned during Christian II's reign, which is indicated by a statute dating 18 May 1523 that instructed the parties in a feud to desist from further activity because *sandemænd* were to be appointed to decide the case.¹⁴⁸

Developments after the Reformation make it clear that the *sandemænd* as an institution faced a certain amount of pressure and restructuring. Christian III's recess from Odense dating 1539 did mention *sandemænd* and their previous powers concerning the prosecution of a person who created a disturbance in court and escaped from the court (if such a person was apprehended in the act, he was to forfeit his life at once)¹⁴⁹ and in some of the later recesses issued by the same king it was made clear that this was also the case concerning homicide.¹⁵⁰ However, at the same time it was stated that *sandemænd* were not in the future to swear concerning property except in cases of boundary disputes. There were a number of more specific decisions, some taken from the coronation charter of Christian III, attached to this; amongst other things that the provincial courts in

¹⁴⁵ See for example DRL 3:13, § 57, in which the provincial judge in a single case was accompanied by people who sat with him.

¹⁴⁶ DRL 3:13, §§ 57 and 70.

¹⁴⁷ See Kai Hørby, "Tiden fra 1340 til 1523", eds. Aksel E. Christensen, H.P. Clausen, Svend Ellehøj and Søren Mørch, *Danmarks historie*, vol. 2.1 (Copenhagen, 1980), pp. 13–268, esp. 241.

¹⁴⁸ FFR, p. 6 (1523).

¹⁴⁹ SGDL 4, pp. 190–197, § 7 (1539). This decision was repeated in 1547, See SGDL 4, pp. 214–236, § 9.

¹⁵⁰ SGDL 4, pp. 214–236, § 16 (1547); SGDL 4, pp. 237–246, § 6 (1551); CCD 1:1, § 21 (1558).

the areas under the Law of Jylland¹⁵¹ had the power to summon the “bedste bygdemænd” (representatives of the region) to decide whether the *sandemænd* had made a mistake in their decision. The emphasis on this possibility indicates that there were too many complaints about the civil law activities of the *sandemænd* since there was a widespread tendency for *sandemænd*, in addition to boundary cases, to also decide other cases concerning property, which might involve the nobility since the same chapter in the charter established that only the king could decide cases about noble estates.¹⁵²

The reduction in the civil powers of the *sandemænd*, i.e. their power to decide property disputes, was repeated by the Dronningborgske Recess of 1551, the Koldingske Recess in 1558 and in the coronation charter of Frederick II of 1559.¹⁵³ At the same time there was an apparent change in the kinds of criminal cases that could be decided by the local courts. Christian III’s coronation charter of 1536 stated that it was no longer possible to transfer a case from a local court to a provincial court before a sentence had been passed, and in a recess from the following year it was confirmed that cases that should be pursued at a local *ting* should always be initiated in that place.¹⁵⁴ These decisions were repeated by recesses in 1547 and 1558 and apparently extended to cover all types of cases in later legislation.¹⁵⁵ Thus, in the words of Poul Johs. Jørgensen, “it had become the rule that any case that was not explicitly exempt should be initiated at the local court and that the provincial court was only a court of second instance.”¹⁵⁶

¹⁵¹ See SDKH, pp. 82–89, § 27. Later on it was pointed out that this was also the case for old men and jurors who swore in comparable cases where SkL and the Law of Sjælland formed part of valid law, see CCD 1:11, § 26 (1559), and CCD 5:346, § 26 (1648), and even CCD 1:1, § 27 (1558).

¹⁵² SGDL 4, pp. 214–236, § 14 (1547), taking its model from SDKH, pp. 82–89, § 16 (1536). A royal ‘decision’ could consist of commanding the parties to decide the case by themselves “in order to stop the dispute at its root”, see KB 1550–55, p. 92 (1551). It was not until the end of the sixteenth century that *sandemænd* and jurors were allowed to decide cases that involved the nobility, see for example the rule concerning 40 marks cases in KB 1588–92, pp. 449–450 (1590).

¹⁵³ See SGDL 4, pp. 237–246, § 16 (1551); CCD 1:1, § 27 (1558); CCD 1:11, § 42 (1559).

¹⁵⁴ See SDKH, pp. 82–89, § 26, and SGDL 4, pp. 172–189, § 17.

¹⁵⁵ See SGDL 4, pp. 237–246, § 3; CCD 1:1, § 8.

¹⁵⁶ See Jørgensen, *Dansk Retshistorie*, p. 515. Occasionally, town court decisions seem to have taken precedence over *herred*’s court decisions, but this happened increasingly rarely because the decisions by town courts thus challenged the royal jurisdiction under which *herred*’s courts functioned, see Poul Meyer, *Danske Bylag*.

Apparently more than this happened in the same period. Some sources reveal that *sandemænd* executed their functions in criminal cases in the local court, although it, according to the Law of Jylland, should have been decided at the provincial court. Thus a few examples from the beginning of the 1550s show that cases of malicious damage, outlawry and homicide were heard by *sandemænd* in *herredsting* in Western Denmark,¹⁵⁷ just as capital punishment was carried out locally across the entire realm.¹⁵⁸ I shall not reject the proposition that such cases had previously been decided by *sandemænd* in local courts, meaning that the this phenomenon in the beginning of the sixteenth century was not new, but I have been unable to find documentary evidence for the *sandemænd* to decide criminal cases in the *herredsting* in the previous centuries. On the contrary. And it is obvious from a study of act books from the seventeenth century that *sandemænd* at this time most commonly conducted and decided cases about homicide, violence and malicious damage in the *herreder*.¹⁵⁹ So the sequence of courts from local to provincial, which was established after the Reformation, appears to have also meant a transfer of criminal cases, which *sandemænd* were to decide, from provincial courts to local courts, i.e. in the opposite direction from the provincial courts to the local courts.

Bishop and Bedste Bygdemænd

As was made clear in the analysis of the possibility for appeal contained in the institution of the bishop and the *bedste bygdemænd*, this institution was probably introduced in connection with the Church

En Fremstilling af det danske Landsbystyre paa Baggrund af retshistoriske Studier over Jordfællesskabets Hovedproblemer (Copenhagen, 1949), pp. 344–355.

¹⁵⁷ See KB 1551–55, pp. 54 (1551), 302 (1554) and 411 (1555). See also KB 1551–55, pp. 119–120 (1552), for an instance where the *sandemænd* decided whether a deceased person had lost his life through misadventure or crime. Later examples can be found in CCD 2:540 (1590); KB 1640–41, p. 12 (1640), and the two following notes. In 1519 the *sandemænd* were granted permission to swear in noble forty-mark cases as long as these did not concern the noble's life or honour.

¹⁵⁸ See for example Rep. 2:5:9909 (1503); KB 1556–60, p. 72 (1557); KB 1556–60, p. 124 (1557); KB 1588–92, pp. 363–364 (1590).

¹⁵⁹ See for example Aasum 1640:98; Aasum 1641:180, 193 and 218. See also the registry of cases in VLD 5, grp. 134, p. 41, although a few of these kinds of cases also appeared before the provincial court, see grp. 40, p. 9. In a few cases it was publicly announced in the provincial court when an appeal was produced from a *herred's* court that *sandemænd* were to be employed, see Aasum 1641:180; Aasum 1643:136.

and the central powers' forcing through of the *sandemænds'* majority decisions in court while the men of the *herred* decided by themselves whether blatant perjury had been committed in connection with unanimous decisions.

Poul Johs. Jørgensen traces the use of the bishop and *bedste bygdemænd* institution in a fundamental article and finds that the bishop's role may have been abandoned as a consequence of the secularisation and imposition of a hierarchy based around judges in the administration of justice after the Reformation. However, he also emphasises that the provincial judge (and by implication also the royal court of law) retained the possibility of summoning the *bedste bygdemænd* to testify whether the *sandemænd* or jurors had come to the right decisions.¹⁶⁰ Frederick II's coronation charter of 1559 explicitly stated that this possibility was also valid where the Law of Skåne were valid, although it mentioned elders and jurors—in other words it was valid for all kinds of juries. In practice, these summonses of regional inhabitants to the provincial court were already to be found in the jurisdiction of Sjælland from the middle of the fifteenth century. Thus the rules of 1559 can be argued to have formalised already existing custom in Sjælland while establishing new rules in Skåne since there is no previous mention in the sources of such a possibility there.¹⁶¹ These appeal juries were called *landenævn* on Lolland. On Sjælland they consisted of a locally appointed jury that treated property cases and in some instances also criminal cases.

Though the Law of Jylland, Eric Klipping's Ordinance for Northern Jylland of 1284 and Thord's Articles stipulated that the juries should consist of eight people and 16 in corresponding juries on Lolland and Sjælland,¹⁶² Poul Johs. Jørgensen shows that the number of involved *bygdemænd* in practice varied from six to 17.¹⁶³ Late-fifteenth-century

¹⁶⁰ See Jørgensen, "Biskop og bedste Bygdemænd", pp. 88–131. Although we find in the coronation charter of Christian II of 1513 and other pre-Reformation statutes that the decision of the bishop and the *bygdemænd* is to stand, see DRL 3:1, § 49, and Jørgensen, "Biskop og bedste Bygdemænd", pp. 124–125. The power of the provincial court judge to summon *bygdemænd* is mentioned by several laws compiled during the reign of Christian III, see SDKH 19, § 27 (1536); SGDL 4, pp. 214–236, § 14 (1547); SGDL 4, pp. 237–246, § 16 (1551); CCD 1:1, § 27 (1558).

¹⁶¹ See CCD 1:11, § 26. Compare these to the examples given in Jørgensen, "Biskop og bedste Bygdemænd", pp. 118–122. See also the same, pp. 126–131, concerning the court.

¹⁶² See JL II 7; DRL 1:15, § 4; Thords Art. 22. See previous note.

¹⁶³ Jørgensen, "Biskop og bedste Bygdemænd", p. 91.

sources make it clear that it was usually the local bishop who summoned both the *bygdemænd* and the two parties (one of whom had appealed the majority decision made by the *sandemænd*), but if the bishop had a personal interest in the case it might happen that it was the neighbouring bishop who presided over the congregation in order to ensure an unbiased evaluation of the case. In some cases this did not happen unless the king intervened to make sure that it did, and where it did not happen the losing party might complain and claim bias. There were, however, only a very small number of cases in which the king intervened to change a decision or demand that the case be heard anew by another congregation presided over by an unbiased bishop even though such an action by the king was in direct contradiction to the law's words that a decision made by the bishop and the *bedste bygdemænd* was to be final.¹⁶⁴

The rise in popularity of the royal court of law may have been caused by a growing lack of confidence in the bishop and the *bygdemænd* during the fifteenth century caused by the Church's manifest interest in many of the property disputes that they were supposed to investigate, which resulted in a falling case load for them. The royal court of law developed into the natural court of appeal for those who were dissatisfied with decisions and procedure at the lower courts and therefore in time many people chose to direct their complaints and appeals to the royal court of law in cases that rightfully ought to have been under the jurisdiction of the bishop and the *bygdemænd*. Christian II's Land Law attempted to compensate for this development by declaring that bishops and *bygdemænd* were not to summon *sandemænd* or other juries without the presence of the king or his substitute.¹⁶⁵ However, in subsequent pre-Reformation legislation we find a return to the rule that the bishop and the *bygdemænd* passed final sentences, which could not be appealed.¹⁶⁶

This increased mistrust of the bishop and *bygdemænd*, which culminated in the dismissal of the bishop as jury leader after the Reformation, can be found in a few instances as early as the middle of the fifteenth

¹⁶⁴ Jørgensen, "Biskop og bedste Bygdemænd", pp. 88–89, 123.

¹⁶⁵ DRL 3:13, § 19. In the copy of the provincial law owned by a member of the Council of the Realm, Mogens Gøye, there was an additional rule that a bishop who was party to a case was to be replaced by two men appointed by the king who were to hear and decide in the case aided by several good men, see DRL 3:13, § viii, p. 214.

¹⁶⁶ Jørgensen, "Biskop og bedste Bygdemænd", pp. 125–126.

century, although it may not necessarily have been a new development even then. The introduction of the so-called *fyllingsmænd* at the end of the thirteenth century, whose function was to witness that a case had been conducted properly before the *sandemænd* could pass sentence, may have been introduced in order to ensure that a decision in a case was uninfluenced by local considerations (and locally appointed *sandemænd*) rather than ending up at the regional jury consisting of the bishop and *bedste bygdemænd*. It is not possible to decide why *fyllingsmænd* appeared, but what I proposed above will not undermine my previous argument that they were introduced as controls to ensure that decisions were in accordance with what local society found right and acceptable, in other words what could be agreed upon. Indeed, they were still mentioned by Osterssøn Veylle in his survey of Danish law dating from the middle of the seventeenth century and in early draft versions of Danske Lov.¹⁶⁷

Herredsnævn, Stokkenævn and Jurors

In addition to the *sandemænd* who exercised their duties in Jylland there were other types of jurors, namely the jury of the *herred* mentioned by the Law of Jylland and the juries known in the eastern provinces of Denmark. While the provincial laws distinguished between these, their terminology and the differences between their powers become less clear from the second half of the thirteenth century. Thus an investigation of the terminology and practical differences—or merging similarities—may be needed.

In the new procedural developments dating from the decades after the publication of the Law of Jylland in 1241 we find the *herredsnævn* (jury of the *herred*), which was supposed to swear in cases concerning counterfeiting, arson and violent robbery. In contrast to the *sandemænd*, according to the Law of Jylland the jury of the *herred* was to be appointed ad hoc by the ombudsman or another unbiased person.

Although the Law of Jylland allowed several kinds of cases to be dealt with by the jury of the *herred*, the other provincial laws only explicitly allowed it to deal with arson. According to Eric's Law for

¹⁶⁷ Christen Osterssøn Veylle, *Glossarium juridicum Danico-Norvegicum: Det er: Alle gamle Danske og Norske Glosers rette Forklaring* (Copenhagen, repr. 1977), pp. 307–308, and the first draft of Danske Lov, see *Forarbejderne til Kong Christian V.s Danske Lov*, 9 vol., eds. V.A. Secher and Chr. Støchel (Copenhagen, 1891–1894), p. 442.

Sjælland fire-starting and arson were to be decided by the jury if there were witnesses and by three oaths of twelve, i.e. 36 compurgators, if no one saw the crime being committed.¹⁶⁸ According to both the Law of Jylland and Eric's Law for Sjælland, the arsonist who set fire to a house in which there were sleeping people was to forfeit his life if he was caught red-handed, whereas he was to be outlawed and to provide compensation (fixed at forty marks by Eric's Law for Sjælland) if the jury found him guilty.¹⁶⁹ The only difference between the laws seems to be that an arsonist on Sjælland could swear himself free with the help of compurgators if there were no witnesses while his case, regardless of whether there were any witnesses, had to be examined by a jury in Jylland. Several conclusions can be drawn from this: *Firstly*, that compurgation was no longer used in Western Denmark in the latter half of the thirteenth century but that it was still in use in Eastern Denmark. *Secondly*, that when they came to pass sentence in a case the juries in Jylland and Sjælland had the same powers. Two of the oldest manuscripts containing the Law of Jylland intimate that the jury of the *herred* mentioned by this law was simply an ad hoc 'jury in the *herred*', exactly as this institution was on Sjælland.¹⁷⁰

Around the same time that the Law of Jylland introduced the jury of the *herred*, i.e. sometime between 1241 and 1276, we find the jury of the *herred* mentioned in the draft law that both King Abel and his brother King Christopher tried unsuccessfully to have passed by the inhabitants of the realm.¹⁷¹ In one chapter of this draft it was suggested that in cases where a shipwrecked person accused another of having taken his goods the case was to be decided by a jury of the *herred*.¹⁷² The Abel-Christopher Decree was composed in Latin, but in this particular instance it appears to have been impossible or not desirable to translate this institution for the administration of justice. Therefore, it was included in the vernacular 'hærætz næfnd'. The other part in this chapter contained rules on the defence in cases where the ombudsman accused someone of having taken salvage to which they had no right. The mention of the jury of the *herred* is not to be found in any other

¹⁶⁸ ESL II 14–15.

¹⁶⁹ See JL III 66 and ESL II 14–15.

¹⁷⁰ See DGL II, p. 492, textual variants to the E manuscript from Flensborg dating from 1300 and its contemporary AM 4, 4° (B1).

¹⁷¹ See Andersen, *Rex imperator in regno suo*, pp. 111–117, with further references.

¹⁷² DRL 1:7, § 21; DRL 1:8, § 17.

chapter in the provincial laws dealing with shipwreck and salvage, not even in the Law of Jylland.¹⁷³ The Abel-Christopher Decree thus seemingly tried to pass jurisdiction over wreckage to the jury of the *herred*—which also was given power to decide cases of arson, counterfeiting and violent robbery in Jylland during the same period—but there was such resistance to this that the previous practice of letting the defendant defend himself through compurgation was preserved.¹⁷⁴ Therefore the jury of the *herred* did not have these powers in the Law of Jylland or Eric's Law for Sjælland, which only seems to have added rules concerning these problems towards the beginning of the 1280s.¹⁷⁵

Thus the jury of the *herred* was an institution that was desirable for the central power and one that it tried to introduce or institutionalise nationally from the middle of the thirteenth century. These efforts met with limited success since only the Law of Jylland gave a role to the jury. That it was the jury of the *herred* that dealt with serious crimes such as arson, counterfeiting and violent robbery was probably in Jylland due to local resistance to the royally appointed *sandemænd*. That there was also a widespread lack of trust in the jury of the *herred*'s ability to decide cases of salvage indicates that local resistance to this jury may have been due to the fact that it was the ombudsman who appointed its members. One solution to this problem was to let an unbiased freeman appoint the jurors, which this was the solution reached in the fifteenth century. At this time the *foged* appointed a person who was subsequently charged with appointing eleven other men to join him in the jury.¹⁷⁶ Christian III's recess of 1547 gave legal shape to this practice, pointedly adding that the person appointed by the ombudsman or the *foged* was to be found "*mett herritzmendtz raadt*" ("with the advice of the men of the *herred*").¹⁷⁷

¹⁷³ This is SkL 165–166 and ASun 101; JL II 61–63; ESL III 58–62.

¹⁷⁴ See previous note.

¹⁷⁵ See the more detailed arguments put forward in Andersen, *Lærd ret og verdslig lovgivning*, pp. 152–169, which amongst other subjects refers to the rules governing shipwreck.

¹⁷⁶ See for example Rep. 1:3:7692 (1447); Rep. 2:1:780 (1457); Rep. 2:1:1070 (1460); Rep. 2:2:4233 (1478). The appointment was not to the jury of the *herred* but to a jury of the beam or simply "the jury", cf the discussion of different kinds of juries below. According to Rep. 1:3:7407 from 1444 the *foged* appointed the twelve members of the jury of the beam, but in this instance they were only required to witness a transfer of property.

¹⁷⁷ SGDL 4, pp. 214–236, § 12.

After its first appearance, the jury of the *herred* was mentioned again in 1284 in King Eric V Klipping's Ordinances for Northern Jylland, Sjælland and Skåne respectively.¹⁷⁸ His ordinance for Jylland dealing with breaches of domestic peace stipulated that a defendant who had not been caught in the act had to defend himself with a jury of the *herred* consisting of twelve unbiased men appointed by another unbiased man.¹⁷⁹ The ordinance for Sjælland provided the same defence for the man who was accused of violent attack in another man's house, and in a later edition to be found in manuscripts from the second half of the fifteenth century it was stated that this was also to be the case if the attacker had only shown up at the other man's house with the purpose of fighting. If this was not the case, a fine and an acknowledgement of culpability was enough.¹⁸⁰ This latter rule was most likely a loan from the ordinance of Skåne which, in addition to this rule, had rules for dealing with those who were accessories to breaches of domestic peace.¹⁸¹

Transgressions against domestic peace in connection with homicide (which was intimately related to the provincial laws' definition of malicious damage) were dealt with by the Law of Skåne and Eric's Law for Sjælland, i.e. for two legal provinces. The Law of Skåne repeated the rules of the Ordinance on Manslaughter from 1200, which only provided for a fine to be imposed and did not deal with the question of what to do if a culprit was unknown.¹⁸² The same was true for the rules of Eric's Law for Sjælland. In contrast, the Law of Jylland did not deal with this kind of transgression against domestic peace despite dealing with disturbances against domestic peace in connection with theft.¹⁸³ Thus the rules in the ordinance of 1284 for Northern Jylland needed to be more comprehensive than in the two other collections because this kind of crime had not been dealt with in law or separated out from other kinds of killings in the legal province of Jylland. Thord's Articles from around 1304 took away the jurisdiction of the *herred* by determining that breaches against domestic peace were to be heard by the provincial court and be decided by 13 *meliores* (nobles) who were

¹⁷⁸ See DRL 1:15; DRL 1:16; DRL 1:17. The nature of this statute is further analysed in Andersen, *Rex imperator in regno suo*, pp. 150–154, with further references.

¹⁷⁹ DRL 1:15, § 3.

¹⁸⁰ DRL 1:16, § 1, and § 2 in the appendix.

¹⁸¹ DRL 1:17, § 4 and § 1.

¹⁸² SkL 87 and ASun 59 and DD 1:4:24, § 6.

¹⁸³ JL II 38.

appointed ad hoc.¹⁸⁴ Furthermore, we must conclude that from 1284 juries of the *herred*, appointed ad hoc dealt with cases of breaches of domestic peace just as they had done for sometime in Sjælland and Skåne.

This transfer of power from unspecified ‘juries’ to ‘juries of the *herred*’ indicates that we are only talking of a change in terminology so that the ‘juries’ that were appointed ad hoc mentioned by the provincial laws of Eastern Denmark in connection with the local courts’ sentencing functions were subsequently simply referred to as ‘juries of the *herred*’. Such an interpretation is supported by the way in which decisions were reached about guilt in cases of arson and by the terminology of Thord’s Articles and some of the later translations of the Law of Jylland.

The Low-German translation of the Law of Jylland that was made around 1400 mentioned the jury of the *herred* (*herdes mannen*) in chapter 64 of book 3.¹⁸⁵ In addition, the Latin translation of the Law of Jylland containing Bishop Knud Mikkelsen’s glosses from around 1450 used the term *denominatos de hæræth*.¹⁸⁶ The Latin Thord’s Articles mentioned three types of juries in chapters 21 and 25, namely *ueredicos*, *næffningos et denominotos*, which in a sixteenth-century Danish translation turned into “*sandemænd*, juries of the *herred* and *stokkenævn*”.¹⁸⁷ It appears to be the same men who were mentioned in Thord’s article 23 when it stated that cases of attempted or successful homicide of a spouse were to be decided by thirteen “*nominamdi...de illo hæræth*”, which was rendered in the vernacular as “*mend aff samme herridt*”.¹⁸⁸ The number thirteen was doubtless introduced to make it possible to reach a majority decision. Finally, Thord’s Articles contained one more rule that indicates that the jury of the *herred* was to be understood to include ‘jurors’, namely when article 12 stipulated that local jurors had to provide an oath if a man was robbed either in the

¹⁸⁴ See Thords Art. 56. Matzen interprets these as the jurors of the *herred*, see Matzen, *Forelæsninger II*, p. 76.

¹⁸⁵ See text 6 in DGL IV.

¹⁸⁶ See JL III 63 in text 5 in DGL IV (which equals JL III 64). A loose translation of Bishop Knud’s glosses, see DGL IV (appendix), p. VII, translates this jury as a jury of the *herred*, see DGL IV (appendix), ch. 131, pp. 66–67 (which equals JL III 64).

¹⁸⁷ See Thords Arts. 21 and 25 (text 1) in DGL IV (appendix), and Thords Arts. 19 and 23 (text 7) in DGL IV (appendix). That the word ‘denominatos’ applies to the jury of the beam is also clear from Thords Art. 55 (text 1) and Thords Art. 52 (text 7).

¹⁸⁸ See Thords Art. 21 (text 7) in DGL IV (appendix) and Thords Art. 23 (text 1) in DGL IV (Tillæg). Matzen, *Forelæsninger II*, p. 76, reaches the same conclusion.

herred or in the borough, a duty which in Sjælland and Skåne clearly fell to those who, in the ordinances of 1284, were known collectively as juries of the *herred*.¹⁸⁹

When dealing with procedural law in his lectures on Danish legal history, Henning Matzen was of the opinion that the jurors of the *herred* “because of their selection from among the members of the *ting* who sat on the court beams, these jurors are also known as beam-men (*stokkemænd*) or *denominati* in contrast to *rans-Nævninger* or *nominate*”.¹⁹⁰ In fact, the situation was, to my opinion, exactly the opposite: According to the Law of Jylland there was no ad hoc jury in criminal cases, unlike the rules of the Law of Skåne and Eric’s Law for Sjælland. So, sometime in the period between 1241 and 1276, when it became necessary to provide rules for three new kinds of crimes—arson, counterfeiting and violent robbery—in Jylland, there was such popular resistance to transferring powers to the royally appointed *sandemænd* that it was decided to either introduce or recognise ad hoc jurors selected from amongst the members of the *ting* in line with practice in Eastern Denmark. In concert with the institutionalising tendency known from the Law of Jylland, these were known as ‘jurors of the *herred*’, on the one hand in order to avoid confusion with *rans-nævninger* (simply called ‘jurors’ in the Law of Jylland) who were not empowered to pass decisions in cases where violence had been utilised to seize the property of strangers, and on the other hand to signal the new jurors’ close association with the local *ting*.

Disregarding normative sources, laws, statutes and recesses, the jury of the *herred* is only mentioned in two instances from the fifteenth century relating to property. One case dates from 1418 and here “the jury of the *herred*, who were twelve discrete and good men” swore at the local court in Lille in witness of the fact that a farmstead near Køje was dedicated to St Magnus’ altar. In the second case, dating from 1459, the king ordered a jury of the *herred* to be constituted in order to decide jurisdictional boundaries.¹⁹¹ As we saw above, after the Reformation a prohibition was made on *sandemænd* passing decisions in matters of property, and this prohibition extended to jurors who were

¹⁸⁹ Thords Art. 12 (text 7) and Thords Art. 15 (text 1): “Item in quacunq̃ue hæræth uel uilla forensi facta fuerit rapina, in placito illius hæræth debent næffningi illius hæræth discernere...”

¹⁹⁰ Matzen, *Forelæsninger II*, p. 76.

¹⁹¹ See Rep. 1:3:5710 and Rep. 2:1:997.

decision-makers in property cases in areas where *sandemænd* were not active.¹⁹² It is worth noting that these two cases did not deal with types of disputes mentioned by the Law of Jylland or Thord's Articles. 'Jury of the *herred*' thus in this context seems to deal with the 'customary' ad hoc jury that was known from the provincial laws in Eastern Denmark. They seem to have come under the common denominator of 'jurors'. For example, in the coronation charters of Frederick II and Frederick III from 1559 and 1648 *sandemænd*, *rans-nævninger* and other jurors were not allowed to swear against legal custom or any law unless they were of unsullied reputation.¹⁹³

The infrequent use of the term 'jury of the *herred*' is not unique. *Rans-nævninger* are rarely known by that name. We find a few examples: in a proof of court action from 1475, which witnessed an earlier decision made by *rans-nævninger*, and a couple of permissions from the 1590s which allowed the king's *lensmand* to appoint royal serfs to be *fogeder* of the *herred*, *sandemænd* or *rans-nævninger* even though the *herred* did not fall under the power of the *len*.¹⁹⁴ There can hardly be any doubt that *rans-nævninger* were utilised on many other occasions, so the rare mentions of juries of the *herred* and *rans-nævninger* indicate that contemporary society did not care particularly about using the precise terminology to name the juries that had acted. Whether it was the 'jury of the *herred*', *rans-nævninger* or other ad hoc juries such as the elders who decided boundary disputes in Eastern Denmark,¹⁹⁵ they were all generally known—and therefore conceptualised—as 'the jury' in practice. Only in relation to the *sandemænd* did the province of Jylland seem to pay attention to the formal terminology and thus provided a careful distinction between this institution and other juries. Therefore it is not possible to decide on the basis of terminology whether inhabitants in Jylland distinguished between using the jury of the *herred* or the *rans-nævninger*. It is possible that in many local courts the annually appointed *rans-nævninger* functioned as jurors in all kinds of cases, for there were places in which we know that they occasionally had problems providing even the minimum number of witnesses to a court action.

¹⁹² See SGDL 4, pp. 214–236, § 14 (1547); SGDL 4, pp. 237–246, § 16 (1551); CCD 1:1, § 27 (1558); CCD 1:11, § 42 (1559).

¹⁹³ See CCD 1:11, § 28, and CCD 5:346, § 28.

¹⁹⁴ See Rep. 2:2:3586; CCD 2:521/KB 1588–92, p. 355; CCD 2:618.

¹⁹⁵ These are still mentioned by the Koldingske Recess of 1558, see CCD 1:1, § 16.

I now need to address the question of the relationship between the so-called *stokkemænd* ('juries of the beam')—which clearly took their name from the four beams that provided the boundaries around the court—and the juries of the *herred* and juries in general.

The first mention of *stokkemænd* or a jury of the beam can be found in Thord's Articles in eight articles composed between 1282 and 1304.¹⁹⁶ Article 8 listed sanctions against the man who demanded that a case be heard by a jury of the beam but did not pursue his case to completion. Such a man was to pay a fine of three marks to the defendant and six marks to the king. Article 9 stated that all cases in which juries of the beam were to make a decision had to be conducted over three *ting* meetings. The jury of the beam had to announce a decision at the last meeting after *fyllingsmænd* witnessed that proceeding had been followed correctly. Article 11 enumerated the consequences of the jury of the beam being condemned for perjury, in other words for having reached a decision against their better knowledge. In such a case the injured litigant was to receive half of the fine that the members of the jury had to pay to the king. Article 21 provided for cases in which a man who had been outlawed by a sentence passed by the bishop and *bedste bygdemænd* could regain his peace if he could disprove the jurors who passed sentence against him, regardless of whether they be *sandemænd*, jurors or jurors of the beam. Article 25 provided a term of six weeks for appeals against decisions made by the jury of the beam (and other juries). Article 36 provided that if jurors of the beam (or *sandemænd* or jurors) decided a case initiated by a party who had been convicted in other contexts but not yet exonerated, they could be punished for perjury because they ought to have known better. Article 41 stated that a man who had previously been convicted by a jury of the beam could not be forced to be a juror of the beam himself as long as there was anyone in the *herred* who had not been convicted by the same jury, i.e. was of unblemished reputation. Article 42 provided rules for the situation where it was impossible to find twelve men in court to make up a jury of the beam—in those cases whoever was present should serve as a juror but names of those absent who, had they been present, would have been appointed, were to be enumerated and article 42 pointed out that these were to be given a proper warning to appear before the next meeting of the court.

¹⁹⁶ See Thords Arts. 8, 9, 11, 21, 25, 36, 41 and 42.

If these rules are compared to the rules concerning *sandemænd* in the Law of Jylland it becomes clear that the two sets of rules are very similar. One could even argue that the rules for the activities of the jury of the beam were modelled on the *sandemænd*. There are a few differences: a plaintiff who did not pursue his case was to pay three marks to the king according to the Law of Jylland, but when the jury of the beam was involved, the fine was six marks. The *sandemand* who perjured himself stood to lose his *hovedlod*, but members of the jury of the beam faced unspecified fines. In the case of the jury of the beam, its members were charged to ensure that the plaintiff was not an already known and not yet exonerated transgressor in another case—although this rule also came to apply to the *sandemænd* in Thord's Articles. There was an increased focus on jurors' unblemished reputations and, finally, there were rules for what to do when there were not enough men present at the court to constitute a jury of the beam—which was a situation that would not arise in the case of *sandemænd* since they were appointed for life.

Thord's Articles give the clear impression that the jury of the beam was an institution receiving its first statutory treatment or was maybe even introduced towards the end of the thirteenth century, and that rules were composed using the model provided by the activities of the *sandemænd*. The major difference is provided by the fact that there is no indication of the kinds of legal disputes to be decided by the juries of the beam, which contrasts them with other legal institutions.

Similarly, in the articles that were added to Thord's Articles in the period between 1304 and 1450, three of them mentioned the jury of the beam.¹⁹⁷ Article 55 announced that juries of the beam, like *kønsnævn*, were to consist of at least thirteen *denominatos* who were to decide by majority—which corresponded to the practice that had developed around this time for *sandemænd* and some other kinds of juries. Article 63 established that the oath sworn by the majority of *sandemænd*, juries of the *herred* or juries of the beam should remain if it had been legally produced and that only the losing party could appeal a sentence—one must assume that this simply confirmed current practice. In article 66 it was stated that if *sandemænd*, jurors or juries of the beam left the court illegally they were to pay a fine of three marks each to the plaintiff—this rule corresponded to the rule found

¹⁹⁷ See Thords Arts. 55, 63 and 66.

in the Law of Jylland for the nominated jurors of a bishop.¹⁹⁸ In other words, these rules clarified practice rather than implementing change. This impression gains further weight by the fact that we do not find juries of the beam mentioned in any later legislation, in other words no new rules were passed to regulate their activities. On a different note, we must remark that the distinctions that these articles make between *sandemænd*, juries of the *herred* and juries of the beam are also found in Bishop Knud Mikkelsen's glosses, which explicitly drew distinctions between the jury of the *herred* and jury of the beam.¹⁹⁹

When it was named as such, the jury of the beam decided cases concerning property rights. Additionally, their jurisdiction only extended to the legal province of Jylland, where the numbers of the jurors varied between 12 and 14, except in a single case in which six evaluators from three *herreder* were nominated to be a jury of the beam in a town court and announced their decision "met opragte fingre oc eed" ("with raised fingers and oath").²⁰⁰ In another instance we are told that the jury of the beam was demanded by an *foged* of the *herred* when eight witnesses of court action testified that one party to a case "within four beams" asked whether property been granted, upon which "the king's *foged* demanded a jury of the beam consisting of twelve *dannemænd*" to testify concerning the transfer and thus end uncertainty about ownership of the estate.²⁰¹

Thus we find that the comparatively sparse sources that mention the practice of the jury of the beam agree well with the picture we gain from Thord's Articles, namely: *that* it was a jury found in Jylland, *that* it shared many similarities with the *sandemænd* and *that* the normative rules for its activities were not always observed in practice (particularly in regard to the number of jurors who made up the jury of the beam). So the question remains: Is a rose is still a rose by any name, i.e. were juries of the *herred*, juries of the beam and jurors the same?

The investigation of the juries known as 'juries of the *herred*', 'juries of the beam' and *rans-nævninger* ('jurors') has shown the rarity of these terms. *Rans-nævninger* were mentioned for the first time in the Law of

¹⁹⁸ See JL II 80.

¹⁹⁹ See the glosses to JL III 64 in DGL IV, text 5 (equals to JL III 63).

²⁰⁰ Thus see Rep. 1:3:7407 (1444); Rep. 2:1:1951 (1465); Rep. 2:2:4025 (1477); Rep. 2:3:5206 (1483); Rep. 2:5:9804 (1503), the latter concerns the jury of the beam in town courts.

²⁰¹ Rep. 1:3:7407 (1444).

Jylland where, together with the *sandemænd*, they were a fundamental institution for the administration of justice within the legal province of Jylland. Their activities and their powers were carefully outlined and although they must have been busy looking after the conflicts that fell within their remit, these jurors, who were appointed for one year at a time, were rarely referred to as *rans-nævninger*. Therefore it is also difficult to decide whether they only passed sentence in those kinds of cases within in their remit or whether they were also used in other kinds of cases.

The jury of the *herred* was mentioned for the first time in the draft law known as the Abel-Christopher Decree dating to the beginning of the 1250s and in the some of the chapters that were added to the Law of Jylland around the same time. The jury of the *herred* was mentioned again in the rules issued to each province by King Eric V Klipping in 1284, in Thord's Articles published in Jylland around 1300 and in some post-Reformation recesses. In legal texts the powers of this ad hoc jury were adjusted over time, namely in laws from the end of the thirteenth century and the sixteenth century, but the few examples of their activities in practice revolve around the juries' role in property cases, a type of case for which they at no time appears to have been given the law's permission to decide.

The jury of the beam was mentioned for the first and only time in a legislative context by Thord's Articles from around 1300, which regulated their activities in close correspondence with rules governing the activities of *sandemænd* in the Law of Jylland. Thord's Articles gave no further consideration of the powers of the ad hoc jurors of the beam, but it is clear from later practice that the jury of the beam manifestly dealt with property disputes in Jylland (they do not even appear to have been in use on the island of Fyn, for example see their absence in the act books of Aasum). Thus they probably filled a gap in the formal administration of justice since none of the other juries mentioned by the Law of Jylland and subsequent legislation seem to have dealt with that kind of dispute.

However, there are two exceptions. The investigation of the jury of the *herred* mentioned above gives two examples of legal practice in a couple of property disputes dating from 1418 and 1459.²⁰² In practical terms, the jury of the beam appears to have dealt with cases of

²⁰² See Rep. 1:3:5710 (1418) and Rep. 2:1:997 (1459).

property and real estate indicating that in these instances there was a certain confusion of the powers of the juries of the beam and of the *herred*. In the present context it is important that one decision was made by a local court in Jylland while the second mention of a jury of the *herred*, which was active in Ramsø in Sjælland, comes from a document composed by the royal chancery, which most likely still used the term regulated by law—jury of the *herred*—while on Sjælland and Skåne according to provincial laws a single term—jury—was used to designate these institutions. This is at least the impression one gains from a study of the sources where the term ‘jury’ is most commonly used in all sources, both from Western and Eastern Denmark and for the kingdom as a whole.²⁰³

It is likely that in some locations and at sometimes there was an awareness that there were different kinds of juries that could announce decisions in different jurisdictions, but that there was a tendency for these to be referred to by one term—juries (in contrast to the *sandemænd* in Jylland who were appointed for life). Sources leave the clear impression that it was very rare to refer to the different juries by specific terms that had been introduced or formalised in legislation between the middle of the thirteenth century and the beginning of the fourteenth. This also meant that jurors who functioned in Eastern Denmark were all appointed ad hoc in the *ting* (and perhaps were termed juries of the *herred*), while those who took office in Jylland were either appointed for life (the *sandemænd* whom we meet so frequently), annually appointed *rans-nævninger* or simply members of the *ting* who were appointed ad hoc (that were then referred to as juries of the *herred* or juries of the beam depending on the subject matter or the whim of the scribe).

Overall, with the exception of the *sandemænd*, they were all referred to and probably also locally thought of as juries, neither more nor less.

²⁰³ See for example DRL 3:13, § 57; SGDL 4, pp. 190–197, § 7 (1539); SGDL 4, pp. 214–236, §§ 9 and 14 (1547); CCD 1:1, § 26 (1559); CCD 2:217 (1580); CCD 2:297 (1582); KB 1580–83, p. 446 (1582); KB 1580–83, p. 501 (1582); KB 1635–36, pp. 280–281 (1635); KB 1635–36, p. 295 (1635); KB 1635–36, p. 307 (1635); CCD 5:346, §§ 26 and 28 (1648); KB 1657, p. 232 (1657).

Procedure as Norm and Practice

As was clear in connection with the provincial laws and the subsequent development of institutions of the *herred* for the administration of justice, there were significant differences between procedure in the three legal provinces Skåne, Sjælland and Jylland from 1200 onwards. In the same way, some of the officers who administrated justice, first and foremost the *foged* was introduced at different times into the provinces following existing power structures and the power of the central administration to impose them. This state of affairs is most clearly seen before the middle of the fifteenth century, after which we find a basic homogeneity in the institutions administering justice in individual provinces. There may have been different kinds of juries in Jylland compared to Eastern Denmark, but a jury was a jury and regardless of the cause of its existence or nomination it took care of the same function, namely to evaluate claims and proofs that had been produced and on the basis of these to reach a decision. Courts across the country faced the same problems concerning *fogeder* and scribes who did not always exercise their offices according to the ethical standards that they should meet.

These fundamental similarities provide the basis for how I have chosen to treat the development of procedural law at the *herredsting* in the period from the end of the thirteenth century to the years of the composition of Koldingske Recess. Rather than following geographical boundaries to provide an analysis of how procedural law developed in Skåne, Sjælland and Jylland, I have decided to draw a distinction between what happened in the first, second, third and—in the case of Sjælland—the fourth meeting of the ting;²⁰⁴ a difference that persisted right up until the unifying measures of Danske Lov of 1683. Having made this choice we may face the danger of subconsciously

²⁰⁴ Concerning the four meetings, see Rep. 2:2:2781 (1470); Rep. 2:2:3606 (1475); Rep. 2:4:7567 (1494); 2:603/KB 1593–96, s. 17 (1593); CCD 3:414, § 15 (1615); CCD 5:143, 2:6, § 13 (1643). And for three meetings, see SGDL 4, pp. 214–236, § 12 (1547); CCD 1:1, § 24 (1558). There were special rules—at least in the later Middle Ages—for those who claimed possession of an object or a piece of land which had been in their possession for a designated period of time. In these cases the claimant had to present his witnesses or have his letters read aloud in three meetings of the court before announcing his willingness to defend his rights at a fourth court meeting, see Rep. 2:1:1333 (1461); Rep. 2:2:3249 (1473); Rep. 2:3:4501 (1479); Rep. 2:3:4506 (1479); Rep. 2:3:4516 (1480); Rep. 2:3:4725 (1480); Rep. 2:3:4910 (1481).

focusing on similarities rather than differences between the three provinces, but the starting point—that the provincial laws provided for real differences—means that by necessity the differences will also be expressed in later sources.

The first refinement of procedural rules after the provincial laws had been written down is to be found in the three ordinances for Northern Jylland, Sjælland and Skåne respectively that were published by Eric V Klipping towards the end of the month of May 1284.

In the ordinance for Jylland the procedure that we know from the Law of Jylland was confirmed: a case must be initiated within six weeks of the transgression unless the plaintiff produced a specified extraordinary proof by oath in order to initiate the case; the case must be dealt with over three sessions of the court including a publication of the case, summoning or appointing relevant juries and the decision of the jury, which could be unanimous or by simple majority but was unassailable unless the case was appealed to and a different decision reached by the bishop and eight *bedste bygdemænd*. It was also pointed out that a culprit who was apprehended red-handed for breaches of domestic peace was to appear at once before the jury and if he was found guilty he was to pay a fine or provide surety within six weeks to avoid outlawry.²⁰⁵

In the ordinances for Sjælland and Skåne, which in many ways were similar, the sanction against a criminal caught red-handed for breaches of domestic peace, i.e. the homicide of a person in their own home or in church, agreed with the sanctions found in the provincial laws of Eastern Denmark: the culprit was outlawed and could only regain his peace if he could persuade the victim's kin to accept half his *hovedlod* and the king to accept the other half. Only in cases where the defendant was accused of having accompanied the killer was he to face a jury, and if a defendant was accused of sheltering an outlaw he could defend himself with an oath of his kin (*kønsnævn*) on Sjælland and with an oath of twelve compurgators in Skåne. As was the case in Jylland, a culprit was to provide surety or pay a fine within six weeks to avoid outlawry.²⁰⁶

The rules of the three ordinances imposed common principles for the entire kingdom, namely that a fine or surety for it had to be

²⁰⁵ DRL 1:15, §§ 3–4 and 9.

²⁰⁶ DRL 1:16, §§ 1–4, and DRL 1:17, §§ 1–2 and 5–6.

produced within six weeks to avoid outlawry. This rule was still being repeated occasionally in the sixteenth century,²⁰⁷ based on the fact that Thord's Articles and later practice and legislation required an appeal to be made within six weeks.²⁰⁸ For the same reason the sentence—from the moment that it became a demand that it should be taken down in writing—had to be written and handed over to at least the losing party within six weeks after the decision of the court so that he might have a real opportunity to evaluate and produce this sentence on appeal. That this did not always happen even in the sixteenth century is evidenced by clarifications sent to judges.²⁰⁹

Thus, from the end of the thirteenth century there seems to have been a consensus and a standardisation of what was to happen when a sentence had been passed: The losing party was to decide within six weeks whether to appeal or to pay a fine or at least provide surety for it. According to Thord's Articles the appeal was to be directed to the bishop and eight nominated *bygdemænd*, and from documented practice on Sjælland we know that there was a comparative *landenævn* ('jury of the province') from the fifteenth century onwards. In the sixteenth century it became increasingly common that the centrally appointed provincial judge, who heard cases in both first and second instance at the provincial court, took over responsibility for these cases. We know nothing about practice in Skåne, where *landenævn* were formally introduced in 1559, but apparently not used very much in comparison to the judge's increasing powers.

The situation is entirely different when we turn to other elements of procedure according to the ordinances of 1284. The ordinance for Jylland followed the rules of the Law of Jylland and all violent attackers were to be produced in front of a jury. This rule was only applied for some cases in the ordinances for Eastern Denmark, for example if the defendant accompanied a violent attacker, while the attacker who was caught in the act was outlawed at once. In addition, the ordinance for Jylland demanded and emphasised that the term within which a case had to be initiated must be observed, that is it focused on how the case was initiated while this aspect of the case was not mentioned at

²⁰⁷ Thus see FFR, pp. 124 (1526), and 265 (1530); SGDL 4, pp. 214–236, § 13 (1547); CCD 1:1, § 26 (1558).

²⁰⁸ See for example Thords Art. 25 (1304); a responsum from c. 1424 in Rigens Ret, Da Dom VII, pp. 346–433, § 12; SGDL 4, pp. 214–236, § 12 (1547).

²⁰⁹ See for example KB 1588–92, p. 667/CCD 2:570 (1591).

all in the ordinances for Eastern Denmark. For this reason I shall pay further attention to what took place from around 1300 to the middle of the seventeenth century at the first, second and third court sessions (and the fourth court session on Sjælland) when a case was initiated.

Proclamation and Summons—the Correct Procedure

The first step in procedure was to initiate a case by summoning another person. It is clear according to the provincial laws that there were only a few special instances in which ‘the public’ personified by the ombudsman had the right to sue individuals, i.e. the main rule was that cases were initiated by private parties against other private parties. It was the private right of suit that was one of the cardinal points of the accusatory procedure while inquisitorial procedure introduced ‘public’ agency, that is it gave the Church as an institution both a general possibility and a duty to accuse anyone who was subject to the Church jurisdiction of transgressions against its rules. While secular law was inspired by this, and in many places had started a process of abandoning the private right to sue in favour of a ‘public’ initiation of procedures in cases of a criminal character, the private right to sue remained the fundamental way to initiate a case in Denmark right up to and after the introduction of *Danske Lov*.²¹⁰

The provincial laws also allowed a case to be initiated in several ways if the parties had not already settled before then. The common procedure was to announce the case in court, that is to publicly proclaim the fact that there had been a transgression against the law and to name the person who was sought for this transgression—which apparently was enough to oblige that person to appear before the *ting* at its next meeting to defend themselves. On Sjælland and in Skåne procedure allowed the defendant to postpone his appearance before the court until the fourth meeting after the proclamation; probably from a consideration that the defendant should be allowed the possibility of hearing about the summons, since the information about it had not been handed to him personally, and to prepare his defence.

²¹⁰ However, Thords Art. 26 say that the king cannot call someone from their *herred* court to decide the case at the royal court of law, although it permits the royal ombudsman to summon someone before their *herredsting* to hear their sentence. This decision should not be interpreted as a general permission for the king’s ombudsman to summon someone for all crimes on behalf of the ‘public’, but should rather be seen as a statement of the correct procedure to be followed.

In contrast to this the Law of Jylland provided a clear period of time within which a case had to be initiated in order to be in accordance with the rules of law. If this period of time, which varied according to the nature of the transgression, was passed, it was necessary to obtain royal permission to initiate the case.

On Sjælland Eric's Law for Sjælland offered the possibility for a man who wanted to summon another to deliver an oral summons to the defendant at his place of residence. The advantage of this procedure was that the case could be initiated much faster, namely at the next meeting of the court, since the defendant had been informed that there was a case against him. The summons was to be made by two men seeking out the defendant on behalf of the plaintiff one or two days before the court met in session depending on whether the defendant was summoned to appear before the local court or the provincial court in Ringsted. At such an oral presentation of the summons the summoners had to ensure that the defendant was in the presence of two kinsmen who could testify that the summons had been performed correctly. The case was then initiated at the first meeting of the court—significantly faster than by a public declaration, which could be repeated as many as three times in order to secure that the defendant heard about it. If the defendant did not appear at the subsequent court session without a legal excuse, he would pay a lesser fine if he had been privately summoned than if the summons had been public.

The clear time limits governing the first plea, the personally delivered and witnessed summons and the economic consequences of ignoring such a summons are traits that have their models in contemporary Roman-canon procedural law, but in Danish secular procedure it was still not the rule that a summons had to be put into writing. Canon law procedure demanded a written summons that was to contain the name of the judge, the nature of the summons and the location and authority of the court, in other words whether the case was rightly conducted in front of a court. These were all demands that were fulfilled by the Danish ecclesiastical province in the latter quarter of the thirteenth century and must have been known to secular parties in suits against ecclesiastical institutions.²¹¹

Nevertheless, it is not until Christian II's Land Law of 1522 that we find the first mention of written summons in secular cases. Here we

²¹¹ See DD 2:3:79 (1283), which ended in arbitration in 1290, see DD 2:3:410.

find directions that summons must include the plaintiff's request to two witnesses and a literate person, i.e. someone who could read and write, to seek out the defendant to read and announce a pre-composed summons containing the judge's name, the reason for the summons and the location and authority of the court. The summoners were to keep the summons as proof—in an attempt to avoid the situation in which the defendant could refuse to appear before the court by claiming that he had not received the summons. The Land Law also provided a clear time frame within which the defendant had to appear before the court after receiving the summons.²¹² Christian II's Land Law was not valid law for more than a year and it is difficult to decide whether written summons to local courts became common during the sixteenth century or even if they were common before that time. It is not until the seventeenth century that written summons are mentioned again in connection with local courts. In several places in the act books from Aasum *herred* we find that a party could summon another party to the *herredsting* with a summons composed by the provincial judge,²¹³ i.e. when the provincial judge thought that the case ought to have been initiated at the *herredsting*, for which he provided the summons. In Christian IV's so-called *Store Reces* from 1643 ('Great Recess', since it collected and harmonized all post-Reformation legislation) it was emphasised that the summoners were to let the defendant read and, should he wish to, copy the summons. If he hid from them, he was to be publicly summoned three times at the same local court, and the summons had to be subsequently read aloud to gain validity.²¹⁴ These rules were similar to the sixteenth-century recess rules for summons to the royal court of law²¹⁵ and presupposed that the summons had been taken down and could be produced in writing.

Thus until the time of Christian II's Land Law, oral summons seem to have been common, as one would expect from the provincial laws. According to Christian I's ordinance for Northern Jylland, no one could be summoned to the provincial court if the summons, by rights, was supposed to be issued by the local court.²¹⁶ However, in contrast to the mention in the Aasum act books of the 1640s, the practice that

²¹² DRL 3:13, §§ 51–52.

²¹³ Aasum 1640:76, 1641:256, 1643:178, 258 and 276.

²¹⁴ CCD 5:143, 2:6, § 9.

²¹⁵ Thus see Koldingske Recess, CCD 1:1, § 5 (1558).

²¹⁶ See DRL 2:30, § 8.

was outlined by *Rigens Ret*, which was contemporary with Christian I's ordinance, leads us to understand that summons was still oral in the middle of the fifteenth century: *Rigens Ret* emphasised that a lawful summons to a local court consisted of two men witnessing in four consecutive court sessions that the summons had been performed correctly and that a summons to the provincial court also only required the plaintiff to inform the defendant in the same way.²¹⁷ In these instances there was apparently no insistence on a written summons.

It is difficult to discern when the change from oral to written summons took place at the level of the local courts because, even though Christian II's Land Law stated that summons were to be written, an open letter of 1582 directed at the inhabitants of Skåne stated that there was to be *no* use of the four times two summoners witnessing the summons—which appears to have been the previous practice and in accordance with *Rigens Ret*—because this procedure was too expensive for poor people. The plaintiff was obliged to pay the summoners and therefore it was decided that in future it would be enough to present a summons at the first court meeting in the presence of two witnesses, after which these two could appear before the fourth meeting of the court and give evidence that a correct summons had been presented, which they could also do at the provincial court.²¹⁸ This naturally indicates that it was not common to use written summons by the late sixteenth century, but it does not tell us whether such a practice was common in some areas, as Christian II wished, or whether it was possible to choose between oral and written summons. However, it is certain that the summons, in accordance with tradition, had to be announced or delivered at the defendant's residence and not just anywhere.²¹⁹

It is quite understandable that some summoners were met with abuse because we find frequent rules for sanctions in cases when a plaintiff initiated a case and summoned another person based on untruths or insufficient evidence from the time of the provincial laws all the way through the royal legislation. Sanctions varied from three-

²¹⁷ Da Dom VII, pp. 346–433, § 15. See also § 13A, in which it is emphasised that if someone appears and defends himself in the case to which he was summoned, further summons are not required.

²¹⁸ CCD 2:305/ KB 1580–83, p. 533 (1582).

²¹⁹ See the clarification in for example KB 1556–60, p. 435 (1560), and KB 1561–65, p. 162 (1562).

to forty-mark fines and the compensation of the opposite party's expenses, board and lodging in connection with a false suit.²²⁰ Thus, to be a summoner was not necessarily a pleasant job because one faced the possibility of encountering abuse or threats of violence.²²¹

That it was necessary to summon a person in good time to ensure that he had time to prepare his defence seems to have been a prerequisite for the correct conduct of a case as early as the time of the provincial laws. However, at that time the demand of a personalised and personally delivered summons appears to have been such a new element of procedure that Eric's Law for Sjælland only mentions it as one amongst many possibilities for initiating a case, next to the more common and traditional proclamation of the case and the name of the defendant in court. In spite of the fact that in occasional specified cases in the sixteenth century we find a publication of the case in court,²²² it is clear from one of the later chapters of Thord's Articles that a summons was a common occurrence by the mid-fifteenth century. This stated that a defendant who had not been summoned might consider whether he would appear at court at a subsequent court meeting to answer the charges of the present case.²²³ Such a demand is clearly tied in with the fact that the defendant was supposed to enter a plea at the second court meeting so that the parties could join the issue in the *litis contestatio*, but procedurally speaking it simply provided a tool for the defendant to refuse to appear before the court if the case had not been initiated properly, that is if he had not been summoned.

This possibility may have been too far reaching because Rigen Ret gave the defendant the possibility of a postponement so that he had time to provide evidences²²⁴—and thus he was no longer able to refuse an accusation—but the rule found in the later part of Thord's Articles indicates that it was generally harder to initiate a case by the first half of the sixteenth century in those areas where the Law of Jylland was followed without the defendant having been warned about this by a summons.

²²⁰ See for example the appendix to Eric Klipping's Ordinance for Sjælland (usually dated to around 1450) in DRL 1:16, § 13 (1284); Rigen Ret in Da Dom VII, pp. 346–433, § 7 (c. 1450); DRL 3:13, § 53 (1522); SGDL 4, pp. 214–236, § 10 (1547).

²²¹ See Da Dom VII, pp. 346–433, § 13A.

²²² Thus for example concerning transgressions against the house, manor and church peace SGDL 4, pp. 214–236, § 12 (1547); CCD 1:1, § 24 (1558).

²²³ Thords Art. 95.

²²⁴ Rigen Ret in Da Dom VII, pp. 346–433, § 14.

So it appears that the personally delivered summons was a common demand for the correct initiation of a case until the middle of the fifteenth century and, and that from the beginning of the sixteenth century at the latest, it was desirable to deliver it in writing at the defendant's residence, although this did not always happen, at least not in Skåne. In Jylland, from the time of the provincial laws onwards, it was required that a case should be initiated within a comparatively short period after a transgression had taken place, and in some cases *Rigens Ret* made this unavoidable.²²⁵ Although we do not find any comprehensive rules concerning this outside Jylland, it was necessary to obtain the king's permission to pursue a case if too much time had elapsed²²⁶ and this may indicate that these time limits had become commonly applied even at local courts.

It was also common to apply an economic sanction if somebody who had been summoned stayed away from the first or subsequent court meetings, and if this defendant did not appear at all he would be declared culpable because of his contumacy.²²⁷ On the other hand, if it was the plaintiff that did not appear before the court, his case collapsed and he had to initiate it again, apparently with no cost.²²⁸ Thus the plaintiff appears not to have been as bound by his case as he had previously been in some medieval legislation.²²⁹

On the other hand, throughout the entire period the local court in the area where the transgression against the law had taken place had to investigate the case, in other words the defendant could, if necessary, be summoned from his own court to the plaintiff's court,²³⁰ an indication that the law sought to secure that the plaintiff had the best starting-point.

²²⁵ Thus see *Rigens Ret* in *Da Dom VII*, pp. 346–433, § 20, concerning homicide.

²²⁶ See for example *KB 1630–32*, pp. 12, 32, 77, 158, 238, 261, 328–329 (all 1630). This might also include the resumption of a case that had been previously decided, see for example *KB 1630–32*, pp. 337, 375, 510 (all 1631).

²²⁷ See for example *DRL 2:18*; § 1 (1446); *Rigens Ret* in *Da Dom VII*, pp. 346–433, § 38 (c. 1450); *Rep. 2:4:9313* (1501); *CCD 1:1*, § 5 (1558).

²²⁸ See *Rigens Ret* in *Da Dom VII*, pp. 346–433, § 14, and *DRL 3:13*, § 56 (1522).

²²⁹ See the treatment of the provincial laws in part 1 of this study and see for example also *Thords Art.* 8, 24 and 80.

²³⁰ Thus see the clarification of this in *Thords Art.* 15.

The Actions of Juries and the Judge—to Find the Truth

According to the oldest provincial laws, The Book on Inheritance and Heinous Crimes, Valdemar's Law for Sjælland and the Law of Skåne, the first meeting of the court was known as the 'court of initiation', i.e. where a case was published and a defendant was sought. The next meeting of the court decided the case, by either the success or failure of the defendant proving his alleged innocence. Thus according to these laws a case could be decided in just two sessions of the court, but it was possible for the defendant to postpone his appearance before the court until its fourth meeting, i.e. the third meeting after the case's initiation, giving him the possibility of preparing his defence by finding the required number of compurgators or proof.

This was the background to the fact that even in the seventeenth century there was still a procedure in Eastern Denmark that stretched over four meetings of the court. According to the Law of Skåne the defendant who was absent at the fourth meeting of the court and thus automatically culpable could have his case resumed if he could perform an ordeal by hot iron as proof of a legitimate reason for staying away. This possibility, in which summons were presented before a court session so that the defendant had to appear before the court at the third court meeting subsequent to the initiation, was introduced on Sjælland by Eric's Law for Sjælland's procedure of summons so that the defendant, having successfully undergone an ordeal by hot iron, could 'purchase' another court session. In other words, a fourth meeting of the court in which the case was to be finally settled with a sentence. If the case had only been announced at court, according to the Sjælland law the defendant had until the fifth meeting of the court (including the initiation meeting) to produce proof. In other words, the defendant could ignore the summons for three court meetings, after which time he was to defend himself against an automatic sentence of culpability—if the person was not there to defend himself at the latest at the fourth meeting of the court he was definitively culpable because of his actions or absence of actions, and this fact was regularly emphasised until well after the Reformation.²³¹ The demand

²³¹ See the mention or clarification of this in for example Rep. 2:1:1333 (1461); DRL 2:18, § 1 (1466); Rep. 2:2:2781 (1470); Rep. 2:2:3249 (1473); Rep. 2:2:3606 (1475); Rep. 2:2:4010 (1477); Rep. 2:4:7567 (1494); KB 1593–96, p. 17/CCD 2:603 (1593); 3:414; § 15 (1615); CCD 5:143, 2:6, § 13 (1643).

that generally *herredsting* passed a final sentence—and there are many complaints that they did not²³²—was of course related to the fact that a case had to conclude at one legal level before it could be appealed to a higher level, whether it be the bishop and *bygdemænd* in Jylland, the provincial jury in Sjælland and Skåne or the provincial court. If the losing party did not appeal within six weeks the case would have reached its final conclusion.²³³

The consequences of the procedural law that was fixed in the Law of Skåne and Eric's Law for Sjælland was that a case that was heard by a *herredsting* in Eastern Denmark could finish very quickly, namely already at the second court meeting if the defendant was to produce proof by compurgation. In these cases, the defendant, as already mentioned, could appear before the court after the case had been published and defend himself with the compurgators. This may not have been the case when Eric's Law for Sjælland required that a dispute was to be decided by a jury.

According to the Law of Jylland and the law of procedure in Jylland, the court case consisted of three court meetings.²³⁴ At the first meeting of the court the plaintiff was to announce the case and proclaim that he wished to have it decided by jurors rather than through mediation or an agreement with the defendant. At the second court meeting the defendant and such jurors as had been nominated were to appear and the parties were to agree the parameters of the dispute. At the third meeting of the court the parties, individually, had to produce proof and allow the jurors question them, after which the jurors made a decision, which they subsequently confirmed before the outstanding members of the court.

We do not know at which stage in the procedure the juries were nominated. From the comparatively sparse source material that mentions practice in this connection in Eastern Denmark we see that, at least in the fifteenth century, it was common that the court president chose one other person to appoint eleven other court members to join

²³² It is mostly complaints to the royal court of law concerning the many endless judgements made by provincial judges that have left documentation, but concerning the courts of the *herred*, see for example KB 1561–65, p. 87 (1561).

²³³ See for example DRL 1:15, §§ 3–4 (1284); Thords Art. 25 (c. 1304); SGDL 4, pp. 214–236, § 12 (1547); SGDL 4, pp. 237–246, § 15 (1551); CCD 1:1, § 24 (1558).

²³⁴ Which amongst others is repeated by Thords Arts. 9–10 and in the introduction of the procedure of Jylland on Fyn and the islands, see KB 1571–75, p. 271 (1573), and KB 1588–92, p. 448 (1590).

him in constituting a jury. This kind of nomination is only found in sources from Eastern Denmark, which was of course also the place in which ad hoc juries were common, and the procedure itself seems to have included the twelve jurors “leaving the court and entering within the four court beams to testify.”²³⁵

While the number of jurors—who in some cases were referred to simply as ‘good men’²³⁶ and who from time to time appeared to prove court actions and sometimes subsequently acted as nominated jurors—was eight in Jylland and areas subject to the Law of Jylland,²³⁷ their number seems to have varied when constituting the ad hoc juries. In Eastern Denmark their number seems to have most commonly been twelve,²³⁸ but in cases of breaching of domestic, farm and church peace post-Reformation legislation from 1547 decreed that the ombudsman (i.e. the *lensmand*, possibly meaning the *lensmand*’s official, namely the *foged*) had to consult with a council of local magnates to appoint an unbiased man who should then nominate twelve men to join him in a jury.²³⁹ In these cases, in other words, there were to be thirteen jurors. This rule was not repeated subsequently and we may take this as evidence of a possible common practice that one chosen ad hoc person appointed eleven other men to form a jury with him, which prevented the introduction of the thirteen-man jury.²⁴⁰ At the end of the sixteenth century and later, the leader of the jury had the deciding vote in cases where the jury was hung.²⁴¹

Customary practice, as seen in the treatment of homicide in Eastern Denmark, provided a strong tradition that legislation could only subsequently confirm in writing. In Eastern Denmark a jury of fifteen or sixteen was required to decide homicide, at the latest in the sixteenth century, and it was this number that became the foundation for subsequent legislation.²⁴²

²³⁵ Rep. 1:3:7692 (1447).

²³⁶ Thus see KB 1561–65, pp. 380–381 (1564).

²³⁷ See for example Rep. 1:3:5706 (1418); Rep. 1:3:6036 (1423); Rep. 1:3:6136 (1424); Rep. 1:3:6597 (1433).

²³⁸ See for example Rep. 2:3:5206 (1483); CCD 1:29 (1560).

²³⁹ See SGDL 4, pp. 214–236, § 12 (1547).

²⁴⁰ This had fallen into disuse by the time of Koldingske Recess, which only required 12, see CCD 1:1, § 24 (1558).

²⁴¹ See CCD 2:570 (1596); CCD 3:414, § 17 (1615).

²⁴² Thus see for example CCD 1:482, § 5 (1569); CCD 2:43, § 7 (1576); KB 1576–79, p. 239 (1577); KB 1576–79, pp. 246–247 (1577); KB 1635–36, pp. 280–281 (1635); KB 1635–36, p. 295 (1635); KB 1635–36, p. 307 (1635); KB 1657, p. 232 (1657).

When the jury had been appointed, whether this happened at the second, third or fourth meeting of the *ting*, it was to evaluate testimony and proofs produced by the parties, which were either volunteered or came out as a consequence of further questioning.²⁴³ In addition, jurors or the *foged* had the possibility of questioning the parties and their witnesses, i.e. they could investigate the dispute to establish the truth of the matter.²⁴⁴ After the Reformation this investigative competences appears to have been the formal possibility of prolonging the court case or postponing a final sentence: According to the legislation a party needed the permission of the judge to postpone the presentation of proofs or witnesses to a more convenient later date.²⁴⁵ Thus the possibility that the case could stall was opened up and this possibility appears to have been commonly abused in the provincial courts. It was therefore necessary to provide clear guidelines for the length of time that could pass while a case was dormant.

In earlier times it was apparently no problem to procure a decision and sentence on the same day, but the new system of appeals, which was introduced by the central administration after the Reformation, demanded that an appeal had to take place within six weeks. It is very possible that it was the appeal system itself and the fear of being summoned before a superior judge that made jurors and local judges unwilling to make quick decisions—they naturally wished to secure themselves against subsequent summons and the overturning of their decisions. In such cases the jurors and/or the judge faced the possibility of a perjury trial that might cost them a monetary fine in addition to the repayment of the plaintiff's costs for sustenance and lodging, or their job if it was concluded that they had passed sentence knowing facts to the contrary,²⁴⁶ or—as a number of recesses phrased it—because of their lack of insight, wrong witness or madness.²⁴⁷ They

²⁴³ For active parties, see for example Rep. 2:2:2629 (1469); Rep. 2:3:4419 (1479); Rep. 2:4:8380 (1497); Rep. 2:5:9637 (1502).

²⁴⁴ Thus see for example Thords Art. 22 (c. 1304); DRL 3:13, § 58 (1522); SGDL 4, pp. 214–236, § 8 (1547); CCD 1:1, § 15 (1558).

²⁴⁵ See DRL 3:13, § 66 (1522); SDGL 4, pp. 214–236, § 8 (1547); CCD 1:1, § 15 (1558). For specific warnings against this, see for example CCD 2:144 (1579) and CCD 2:393 (1585).

²⁴⁶ For legal formulations and specific instances, see for example Thords Art. 11, 12 and 20 (c. 1304) and 72 and 94 (c. 1450); Rigen Ret in Da Dom VII, pp. 346–433, § 2; SGDL 4, pp. 214–236, § 7 (1547); KB 1561–65, p. 202 (1562). Accusations concerning this could also lead to acquittal; see for example KB 1566–70, pp. 345–346 (1568).

²⁴⁷ SGDL 4, pp. 214–236, § 7 (1547); CCD 1:1, § 9 (1558).

could also settle with the appellant and thus avoid further legal proceedings if they did not wish to stand by their decision and sentence, an occurrence that must have happened more frequently than we can see in the surviving sources.²⁴⁸

Furthermore, the illegal absence of summoned jurors, which appeared in the law of procedure in Jylland, seems to have been a common problem.²⁴⁹ In some cases the reason for such an absence could be that the *foged* had forgotten or simply neglected to summon them.²⁵⁰ If jurors *had* been summoned they were to pass sentence even if the two parties had settled their differences.²⁵¹ This rule was of course an expression of the fact that, for reasons of procedural economy, it was necessary to have exhausted all possibilities of settlement before jurors and the legal system were involved in a dispute.

From the time of the provincial laws it was a requirement that the parties and their witnesses appeared personally in court, and this demand was regularly repeated well into the post-Reformation period,²⁵² to the extent that in Christian II's Land Law we learn that when a witness was ill the judge was to send the scribe and two men to him to record his deposition.²⁵³ On the other hand, by the mid-fifteenth century there are indications that it was possible for paupers to empower someone else to direct the case for them if they were not wealthy enough, subject to a magnate, an outlaw or convicted of a crime and therefore untrustworthy.²⁵⁴ However, such proxies were still not professionals.

Jurors and judges were charged with finding the truth, sometimes by combining forces, by questioning the parties and their witnesses, but of course in many cases jurors would have found it difficult to

²⁴⁸ See for example KB 1576–79, p. 239 (1577).

²⁴⁹ See for example Thords Arts. 66 and 78 (c. 1450).

²⁵⁰ See for example Thords Art. 76 (c. 1450).

²⁵¹ CCD 2:540 (1590).

²⁵² See DRL 1:16, § 12 (the appendix dates to the period after 1284); Rigen Ret in Da Dom VII, pp. 346–433, § 6 (ca. 1450); DRL 3:13, § 66 (1522); SGDL 4, pp. 214–236, § 8 (1547); SGDL 4, pp. 237–246, § 4 (1551); CCD 1:1, § 12 (1558). The medieval demand that a case could not be finished and a sentence could not be carried out if one party was not present was emphasized in specific cases time after time, see for example KB 1561–65, p. 77 (1561); KB 1561–65, p. 276 (1563); KB 1561–65, p. 299 (1563); KB 1561–65, pp. 457, 468, 496, 540–541 (all 1564); KB 1561–65, p. 580 (1565).

²⁵³ See DRL 3:13, § 66 (1522).

²⁵⁴ See for example Thords Art. 82 (c. 1450); Rigen Ret in Da Dom VII, pp. 346–433, § 24 (c. 1450); DRL 3:13, § 50 (1522); KB 1588–92, p. 203 (1589).

decide whether the questioned party spoke the truth. The many rules governing what to do with a party or witness who perjured himself force us to conclude that such an occurrence was not unknown in medieval and post-Reformation Denmark. In the beginning perjury attracted a fine, most commonly to be paid to both the opposing party and to the king, and repeat crimes increased the penalty so that in post-Reformation society such a perjurer could be forced to pay his entire estate in the first instance with exile in the second and by losing two fingers the third time. It was usually the *lensmand* that carried out such a punishment when he had received the written sentence with the scribe's indications of who the perjurer was, but if the perjurer was noble the nobility and later the king and the Council of the Realm carried out the punishment themselves.²⁵⁵

It is clear that the consequences for perjury were more severe after the Reformation, no doubt because of the intensified awareness of God's will following the Reformation, which is why these rules also affected thieves, warlocks and similar. Not even the punishment for procuring false evidence was as severe as the consequences of raising two fingers and swearing to tell the truth and then doing the opposite.²⁵⁶ If convicted of such a crime the perjurer was to lose his entire *hovedlod*. The perjurer could not expect to be believed in future, and his evidence would not be allowed in any future dispute. If his evidence was subsequently admitted in court, he would be punished 'on his fingers' and if the judge or the scribe knew about his disqualification they were to pay a fine of three marks to the opposing party and the king. Furthermore, his evidence disqualified all subsequent evidence in the case so that the party for whom he gave evidence would gain

²⁵⁵ Thus see a later edition to Eric Klipping's Ordinance for Sjælland from 1284, see DRL 1:16, § 7 (appendix); Thords Art. 94; Rigens Ret in Da Dom VII, pp. 346–433, §§ 1–2 (c. 1450); SGDL 4, pp. 190–197, § 2 (1539); SGDL 4, pp. 214–236, § 8 (1547); SGDL 4, pp. 237–246, §§ 13–14 and 16 (1551); CCD 1:1, § 16 (1558); CCD 1:11, § 27 (1559). For specific examples concerning jurisdiction over noble cases, see for example KB 1566–70, p. 413 (1568); KB 1576–79, p. 182 (1577); KB 1580–83, p. 7, 80, 143 (all 1580).

²⁵⁶ See CCD 2:539 (1590). From the beginning of the sixteenth century the law specified that it was necessary to raise two fingers to swear, see DRL 3:13, § 68 (1522), and CCD 1:1, § 16 (1558), but it appears that this was only one of several ways in which witness could be produced in the high Middle Ages. Another way was to place a hand on the Bible, which appears to have been still practised towards the end of the sixteenth century, see KB 1588–92, p. 863 (1592).

no advantage.²⁵⁷ However, the punishment for perjury seems to have become lighter with the passage of time, possibly as a consequence of an increasing secularisation compared to the severe post-Reformation law of punishments. From the end of the sixteenth century it became more common to allow transgressors to pay a large monetary fine or put them into the debtors' prison at Bremerholm in Copenhagen.²⁵⁸ In an attempt at prevention, the judge was encouraged to instruct the witnesses about the consequences of perjury.²⁵⁹ According to Christian II's Land Law from 1522 the judge was additionally to enquire of individual witnesses their age, place of birth, name, where they served, their address, civil status and whether they were related to the party for whom they gave witness in order to ascertain their position in relation to the litigants, and to demand that the witness produce an oath that he had not been instructed in his evidence.²⁶⁰

As already mentioned, access to written confirmation of land transactions was considerably better in the fifteenth century and therefore this kind of written evidence became more important and replaced some of the older means of proof. Forging documents, either the text or the seals, therefore attracted fines of forty marks, to be paid to both the opposing litigant and the king.²⁶¹ As the use and legal importance of letters as proof increased it became more and more common to compose false letters in the name of the king, to produce and use false seals and to transfer old seals to new documents.²⁶²

The older means of proof which seems to have been used less and less through the fourteenth, fifteenth and sixteenth centuries was compurgation. According to some of the late medieval laws that continued in use, compurgators were to be an important and common means of proof, but in late-medieval and particularly post-Reformation sources we do not see many compurgators, who produce an oath about the person rather than the substance of the dispute. There are a few

²⁵⁷ SGDL 4, pp. 214–236, § 8 (1547); SGDL 4, pp. 237–246, § 13 (1551); CCD 1:1, §§ 16–18 (1558).

²⁵⁸ See for example KB 1598–1602, pp. 165 and 188–189 (1597); KB 1598–1602, p. 237 (1598); KB 1598–1602, pp. 570–571 (1600).

²⁵⁹ See for example DRL 3:13, § 67 (1522); CCD 1:1, § 16 (1558).

²⁶⁰ DRL 3:13, § 67 (1522).

²⁶¹ Thords Art. 38 (c. 1304); Rigers Ret in Da Dom VII, pp. 346–433, § 2 (c. 1450).

²⁶² See for example Thords Art. 37 (c. 1304); Rep. 2:3:5099 (1482); KB 1571–75, p. 62 (1571); KB 1580–83, p. 523 (1582); KB 1584–88, pp. 141–142 (1584); KB 1584–88, pp. 431–432 (1585); KB 1584–88, p. 652 (1587); KB 1584–88, p. 869 (1587).

examples, such as the *lensmand* at Kalø in Jylland who purged himself of the accusation that he had assisted in a homicide by swearing as the twelfth compurgator in 1422 and in 1410 when a man accused of a violent crime, having produced a similar oath in accordance with custom,²⁶³ settled with the plaintiff, who in return promised eternal friendship.²⁶⁴ So, written law had one proof, custom another. We find a similar situation in the *kønsnævn* that from time to time are to be found in civil and criminal cases.²⁶⁵ However, these do not seem to have been over-ruled or set aside, unlike other decisions made by compurgation. The *kønsnævn* faced a different problem, namely that the freeman who was required to produce a *kønsed* (an oath of kin) often produced kinsmen who lived so far away that they knew absolutely nothing about the facts of the case—which had become a demand in contrast to the medieval compurgation—and therefore Christian IV's *Lille Reces* (*Little Recess*—compared to the Great Recess of 1643) from 1615 decided that in future only kin resident in the defendant's *herred* could produce such an oath.²⁶⁶

The proof of court action (*tingsvidne*), which was one of the most important means of proof in the Middle Ages and after the Reformation, could consist of between eight and twenty-four witnesses who gave evidence about what they had witnessed in court.²⁶⁷ In the sixteenth century their use was regulated in such a way that it became a demand that the party who wished to produce a proof of court action was to announce this in good time so that as many participants of the *ting* as possible could appear to give evidence and so that the scribe could be warned that he would be expected to write and seal the document that confirmed the court actions.²⁶⁸

Sentence and Execution

When jurors or the judge, and assistant judges when necessary, had studied the claims and proofs they were to pass sentence, after which

²⁶³ See Rigens Ret in Da Dom VII, pp. 346–433, § 11.

²⁶⁴ See respectively Rep. 1:3:6015 (1423) and Rep. 1:3:5090 (1410).

²⁶⁵ See for example Rep. 2:3:5677 (1485), and SGDL 4, pp. 214–236, § 12 (1547).

²⁶⁶ CCD 3:414, § 42 (1615).

²⁶⁷ Lerdam, *Kongen og tinget*, pp. 252–255. For specific instances, see for example Rep. 1:3:7407 (1444); Rep. 2:1:1169 (1460); Rep. 2:2:3586 (1475); Rep. 2:7:11810 (1511).

²⁶⁸ See DRL 3:13, § 71 (1522); SGDL 4, pp. 214–236, § 8 (1547); CCD 1:1, § 14 (1558).

the leader of the court (whether he was called *tingfører* (court director), *foged* (official) or judge) was to announce a decision, i.e. decide which consequences the culprit should face because of his transgression.

In the first instance the sentence was announced orally immediately after a decision had been made in the case.²⁶⁹ Subsequently the judge and any assistant judges, at least from around the end of the fifteenth century,²⁷⁰ were to write down the sentence that had been passed by the *herredsting* in such a way that it contained information about property deeds, other relevant documents and other proofs, in other words the background to the decision.²⁷¹ It appears to have been a common problem for successful litigants to obtain written copies of the sentence, at least this is the impression we gain from the fact that after the Reformation it was emphasised repeatedly to *fogeder*, judges and scribes that their duty was to write and distribute the sentences that they pronounced in order to avoid a summons to a higher court for obstruction of justice.²⁷²

One reason for a culprit to summon the local *foged* to a higher court was his sense of injustice if he thought that he had been inequitably treated, for example if there had been no consideration of whether his transgression was intentional.²⁷³ If the culprit was not satisfied with the decision of the local court he could “*stefne heritsfogden met same sin don*” (“summon the *foged* with his sentence”) to the provincial court.²⁷⁴ Thus it was the judge who was summoned to account for his decision. If the culprit summoned the judge or others who had a sentencing function—*sandemænd*, jurors or such like—it was to be on his own account if another unfavourable decision was reached.²⁷⁵

While the ombudsman, who served the same function as the *foged* later on, had had few executive functions since, central power and

²⁶⁹ DRL 3:13, § 69 (1522); KB 1550–55, p. 45 (1551); KB 1550–55, p. 301 (1554); KB 1550–55, p. 329 (1554).

²⁷⁰ See for example Rep. 2:2:3190 (1473).

²⁷¹ Rep. 2:2:3190 (1473).

²⁷² See for example KB 1550–55, p. 45 (1551); KB 1550–55, p. 301 (1554); KB 1550–55, p. 329 (1554); KB 1556–60, p. 412 (1560); KB 1588–92, p. 101 (1588).

²⁷³ After the High Middle Ages this became a fundamental criterion for the meting out of punishment, see for example DRL 3:13, § 61 (1522); SGDL 4, pp. 237–246, § 6 (1551); CCD 1:1, § 21 (1558).

²⁷⁴ CCD 1:1, § 8 (1558), with a specific example in KB 1550–55, p. 301 (1554).

²⁷⁵ This was confirmed by CCD 1:1, § 8 (1558), but it has roots all the way back to the High Middle Ages, see DRL 1:13, § 11, which was transmitted through SGDL 4, pp. 214–236, § 3 (1547).

its local executives such as the *lensmand* and the *foged* became more visible in the fifteenth century when the office of *foged* became common across the country. However, after the Reformation central power began to impose more control over the legal system and also the executive functions. Among other things this meant that the *foged* and his helpers were *to* seek out bad debtors, *to* seize goods to the value of debts owed,²⁷⁶ *to* seek out a culprit at the request of a successful litigant,²⁷⁷ and *to* carry out sentences in increasingly diverse kinds of cases.

It is worth noting that central power did not play such a comprehensive role that we can talk of a total reform of the administration of law in the sixteenth century. Fundamentally it was still based on private initiative, both with regard to initiating a case for transgressions against the law and with regard to compensation. The difference in comparison to the medieval system based largely on self-help was that, post-Reformation, litigants had recourse to a state and central power that drew its authority directly from God without any questions.

The streamlining of the administration of justice and the apparent wish for sentences to be carried out—even if that needed the intervention of central power—seems not to have been a principle until the end of the sixteenth century.²⁷⁸ At that time, these reforms had a major influence on at least one aspect of private conflict resolution, namely the feud. The feud was a private application of force that was generally seen as being fully legitimate as it was a necessary means of enforcing justice in a society where the state had not yet gained a full monopoly on violence and legal protection. In other words, feud was a means of justice that was available under certain circumstances to parties in legal disputes to force their opponents to a settlement or to conform to a legal claim or decision.²⁷⁹ The right to feud initially included all groups of society throughout the Middle Ages, but in the sixteenth

²⁷⁶ Thus for example SGDL 4, pp. 190–197, § 6 (1539); SGDL 4, pp. 214–236, § 34 (1547). The possibility for ‘public’ recovery does not seem to have included the raising of missing bail because in those cases the guarantors themselves were responsible for recovery, see *Rigens Ret in Da Dom VII*, pp. 346–433, §§ 20, 31, 35, 36 and 36 A.

²⁷⁷ SGDL 4, pp. 172–189, § 7 (1537); SGDL 4, pp. 190–197, § 1 (1539); SGDL 4, pp. 214–236, § 16 (1547); SGDL 4, pp. 237–246, § 6 (1551), CCD 1:1, § 21 (1558).

²⁷⁸ Thus see the prohibition in CCD 2:287 (1582); CCD 2:415 (1585); CCD 2:510 (1589).

²⁷⁹ See the fundamental study by Fenger, *Fejde og mandebod*, which now should be supplemented by Jeppe Büchert Netterstrøm, “Bondefejder i Danmark 1450–1650”, ed. Erik Opsahl, *Fejder og fred i nordisk middelalder* (Oslo, 2007), pp. 35–72.

century we see a decrease in the frequency of feuding. This is most likely a result of the efforts of royal power, the Church and the nobility to lessen private acceptable violence in order to secure internal peace, reduce the risk of offending God and thus incur His punishment and for purely financial reasons, namely to secure peace for peasants so that they could cultivate the lands owned by major landowners.²⁸⁰

The disappearance of the right to feud in the sixteenth and early seventeenth centuries meant that ideologically and practically speaking penal law became a public matter.²⁸¹ It was, however, still a possibility to reach a settlement outside the court in the manner that had been described as early as the Law of Jylland, even though a settlement agreed in court became the norm (the sources do not tell us anything about private settlements for which reason it is difficult to determine their extent). A good example showing that attempted settlement was probably the social norm comes from 1481 when two parties appeared before their local court. The plaintiff presented his plea, the defendant replied and subsequently the judge enquired whether both parties were ready to accept the court's judgement. They agreed that they were and the judge conferred with the 'good men' who appeared at the court and admonished the parties to appear "again in fourteen days if you cannot agree." A fortnight later they appeared before the court again and the judge passed a decision in accordance with the advice he had received from the good men of the court.²⁸²

The desirability of a settlement did not decrease after the Reformation, at least judging by the surviving act books. In addition, litigants had the commonly used possibility of submitting their dispute to arbitration. The major difference between arbitration and settlement was that the latter was not sanctioned by the court and was a fundamentally voluntary agreement while arbitration was court sanctioned since it required the parties to renounce the possibility of submitting the case to the decision of the court. Instead they had to declare that they were willing to let an expert arbiter make a final decision in their

²⁸⁰ Netterstrøm, *At forsvare til rette*, and Jeppe Büchert Netterstrøm, "Øvrigheden, bønderne og fejden i Danmarks senmiddelalder", eds. Agnes S. Arnórsdóttir, Per Ingeman and Bjørn Poulsen, *Konge, kirke og samfund. De to øvrighedsmagter i dansk senmiddelalder* (Aarhus, 2007), pp. 301–328.

²⁸¹ Poul Johs. Jørgensen, *Den danske strafferets udvikling i tiden fra reformationen til Kristian V's Lov* (Copenhagen, 2007), pp. 12–26. See also Fenger, *Fejde og mandebod*.

²⁸² Rep. 2:3:4895 (1481).

dispute, which was to be binding for both parties. Such an arbiter was not necessarily involved in a settlement. An agreement about arbitration could also be made voluntarily after the dispute had been initiated. However, it is doubtful that medieval and post-Reformation Danish society distinguished between a decision reached by arbitration and a settlement reached out of court. The important thing was to reconcile the parties and thus avoid a court case and a subsequent disturbance. Socially and economically, it was simply the most sensible way of proceeding for all concerned, and this argument carried equal weight in the medieval and the more centralising post-Reformation Danish societies.

Summary

By and large, Danish procedural law from the beginning of the fourteenth century to the middle of the sixteenth century was remarkably similar to the procedure presented by the provincial laws of the thirteenth century. It took the form of a mixture of accusatory and inquisitorial procedure in which private suit, individual pleas and proofs, together with fixed legal consequences, were characteristics drawn from the accusatory form and short, fixed terms and the possibility of further questioning by jurors and judges and their study of proofs in order to establish truth were typical of the inquisitorial form of procedure. To designate this mixture of two fundamental types of procedure as a 'Danish' procedural law is slightly misleading because in the High Middle Ages this 'Danish' procedural law consisted of two largely very different procedures.

In one procedure—in areas which applied the Law of Jylland—the case was to be announced at a court meeting, i.e. the plaintiff had to publicly announce that he was seeking another named person for a transgression against the law. While this proclamation was replaced or supplemented by a personal delivery of summons to the defendant from around 1300, such summons do not appear to have been taken down in writing until around the time of the Reformation. In a subsequent court meeting the defendant was to appear and state his position, after which the two parties in the presence of jurors agreed publicly about the matter under dispute. At the third meeting of the court, which was also to be the last meeting according to the law, the parties were to produce their proofs, which the jurors—and over time

the *foged*/judge—could study and interrogate so that they established the best possible foundation for making a decision based on what they found to be true. Until the matter under dispute had been determined at the second meeting of the court the parties could enter into a settlement without great financial outlay. However, after the second meeting the suit was binding and demanded a legal decision.

The other means of conducting a case—i.e. that valid for Skåne and Sjælland—allowed either a publication like that permissible in Jylland or a direct summons of the defendant to court, which meant that in real terms the delay that was an inevitable consequence of the publication was avoided. In contrast to the procedure in Jylland the defendant could delay the case by not appearing before the court and, on the one hand, enter a plea and on the other produce his proofs at the third meeting of the court after the initiation of the case. This possibility also meant that the parties could enjoy a long period of time in which to assemble their proofs or—which is a real possibility—negotiate a settlement. With this in mind we must conclude that the development—the difference between the procedural law found in the provincial laws and the procedural law found in post-Reformation sixteenth-century law—was not particularly pronounced in terms of the steps taken in individual courts. The major difference was found in the structure of the institutions for the administration of justice, their increasing stratification and in changes in the admissibility of proofs.

Turning first to the means of proof, there is a clear picture that compurgation in practical terms disappeared in the first half of the sixteenth century as a consequence of the Reformation and its new legislation while written proof such as documents, letters, and so on, became more important means of proof from the second half of the fifteenth century. Witnesses also became increasingly more important but, in contrast to many other European countries, Danish courts were very wary and maybe even sceptical of circumstantial evidence since this kind of evidence is not mentioned much in the sources while the role of compurgators decreased. There seems to have been a common desire to establish the truth or at least to reconcile parties to each other without a formal court decision.

With regard to the increased hierarchy in the system of courts, this was implemented after the Reformation, which saw a clear sequence of courts going from local courts to the provincial courts and thence onwards to the royal court of law. This system meant that at the local level both the successful and the unsuccessful party needed to have a

written copy of the decision to be produced if the case was appealed. In addition, we must presume that an attendant consequence of this was that the judges at the lower courts became even more careful to pass sentences that agreed with valid law since they risked a fine to be paid to the appellant if the case was appealed.

By far the most important developments took place in the institutions for the administration of justice. Firstly, the realm was divided into a number of larger administrative areas in the fourteenth century, each of which was subject to a *lensmand* (the former ombudsman) and made up of several *herreder*. By the beginning of the fifteenth century a local representative for the *lensmand* was established in each *herred*—the *foged* (official), who presided over the local court. This meant that the local royal representative suddenly had a larger hinterland and thus carried more weight than previously. In local terms, this meant that the *foged* did not just preside over the court but, by the end of the fifteenth century, many of the *herreder* in Denmark accepted him as their only judge.

Secondly, it became more common to have a scribe associated with the *herredsting*, probably during the second half of the fifteenth century, so that the parties could now obtain written copies of decisions, property transactions, and so on, and so that a written record of court transactions could be kept as demanded by the central administration in 1551. The act book contained notices of all important statements, all decisions, etc. More than anything, it meant that litigants needed to seek out the courts to conduct their cases, property transfers, etc. in order to make sure that they had proof of these transactions.

Thirdly, juries seem to have lost influence as the *foged* became more powerful. Their dwindling role can be seen in the way in which the activities of *sandemænd* were limited during the sixteenth century and the developments in terminology that made the surviving sources treat all kinds of juries in a similar manner without reference to whether they were appointed ad hoc or permanent. Not even the legislation that was passed after the Reformation made such a distinction.

This brief outline of the development from the end of the thirteenth century to the middle of the sixteenth century should not be seen as proposing that there was a linear, constant, planned and unavoidable development in the implementation of centralisation and hierarchy—that things did not work according to rule, the letter of the law and best ‘administrative practice’ can be seen from the many complaints about local *fogeder*, local scribes and jurors in their roles as assistant

judges. However, though there may have been inefficient legal officers, there is clear evidence that central power had an increasing will and possibility to intervene against such officers and their decisions and that it was only a question of time before such incompetence was eliminated.

In addition, it is clear that the Danish institutions for the administration of justice and their development locally can best be seen as one variation amongst many on the same theme. However, the development in Denmark may have been later than comparable developments in Southern Europe, where local units with sentencing functions had been imposed and where inquisitorial procedure had been more quickly applied than in Denmark.

CHAPTER NINE

LANDSTINGET—BETWEEN THE PEOPLE AND THE KING

Originally, the provincial courts (*landsting*) were the equivalent of the local courts (*herredsting*), at least as they were described by the provincial laws. As such, they could be first-instance courts for most kinds of legal disputes. That the provincial court carried a different weight in terms of power-politics is indicated by the fact that it was this provincial court that was the first court of instance in cases of killing in which the legal consequence in the final analysis could be outlawry. The *landsting* had a geographically more extensive authority backing up its legal decisions than the local *herredsting*. For this reason, royal power must have been more interested in influencing the provincial courts, which seem also to have been able to accept or reject a claimant to the throne through most of the Middle Ages.

The division of a kingdom into provinces or regions that had their own jurisdiction and underlying local jurisdictions was a common phenomenon in medieval Europe. There were varying reasons for such developments, but typically their origins are lost in the mists of time (and thus they gain a touch of something ancient and popular).¹ Alternatively the developments were the result of a royal administrative policy such as that found in twelfth-century Sicily.² In the Danish case, we do not know the historical background of the regions—the *lande*—but from the time of the provincial laws we begin to have examples of how their *ting* functioned and developed. This is the development that I shall investigate more closely to see whether these *ting*, which the king must have been interested in controlling, bear the imprint of the development of procedural law that we know from other parts of

¹ For a discussion of this, see Lupoi, *The Origins of the European Legal Order*, pp. 173–223.

² Dilcher, *Die Sizilische Gesetzgebung Kaiser Friedrichs II.*, p. 59. Regional courts, provincial courts with sentencing functions, are also known in other Scandinavian countries; however their activities were severely curtailed in the thirteenth and fourteenth centuries as a consequence of royal policy, see Sunde, *Speculum legale*, pp. 81–85, and Gösta Åqvist, *Kungen och rätten. Studier till uppkomsten och den tidiga utvecklingen av kunagstiftningsmakt och domsrätt under medeltiden* (Stockholm, 1989).

Europe where central powers demonstrated an influence over similar courts and assemblies.

The Procedure and Running of the Landsting

According to the provincial laws the *landsting* met every fortnight, and this tradition remained unchanged for many centuries.³ The day of the week on which *ting* were held could vary from province to province and it was not until 1643 that Wednesday was designated as *ting* day across the country.⁴ Prior to the sixteenth century we do not even know which time of day the *ting* met, but it was apparently not always in the morning because it was emphasised by the central administration in 1593 that the *ting* must start early because if it did not there was a risk that too many of those attending the *ting* would be intoxicated before the *ting* started its business.⁵

However, we see in Christian II's Land Law of 1522 that this problem was not a new one because it stipulated that a judge did not need to listen to an intoxicated person. In other words, if taken to its final conclusion, the intoxicated man risked losing his case.⁶ The stipulations of the provincial laws and later statutes and recesses concerning transgressions against the peace of the *ting* do not distinguish between the *ting* in which they took place. However, a few statutes from the end of the sixteenth century intimate that the central administration paid particular attention to stamping out such transgressions at the *landsting*—for example when the parties “pulled each other by the beard, hair; attacking each other with hits in the mouth or with knives drawn, daggers and other weapons.”⁷

³ See for example DRL 3:13, § 37 (1522).

⁴ See CCD 5:143, 2:6, § 4 (1643).

⁵ See CCD 2:605/KB 1593–96, p. 18 (1593). The problem was so severe that the following year the provincial courts on the island of Langeland had to be relocated because too many participants were drunk, see CCD 2:641/KB 1593–96, p. 301 (1594). 1643 saw the final prohibition against the construction close to the courts of “inns or huts that dispense beer or other kinds of drink”, see CCD 5:143, 2:6, § 6 (1643). Subsequently the relocation of a provincial court could also be caused by a temporary risk of contagious disease or a temporary union of individual courts because of a lack of competent judges or for practical reasons, see Andersen, *Studier i dansk proceshistorie*, pp. 206–207.

⁶ DRL 3:13, § 55 (1522).

⁷ CCD 2:300 (1582); for the quotation, see CCD 2:538/KB 1588–92, p. 448 (1590).

The location of the *landsting* is not mentioned by the sources until the sixteenth and seventeenth centuries. This is because not only was the central administration keen to make the administration of justice more effective, for example by prohibiting the serving of alcohol at the *ting*, but also it was apparently not until then that the *landsting* was located in a building, as was also the case with the local *ting*. The courthouses that Christian II gave instructions to be built in his realm in his law of 1522 were intended to house both the local and provincial *ting*,⁸ and were apparently intended to replace the open-air tings enclosed by benches that had previously been the site of the local and provincial *ting*.⁹

Although we are speaking of a normative statement (which was annulled the next year when Christian II was deposed) it is possible that building work was initiated in some places, but it was not until an entire generation later that we find courthouses referred to regularly. This happened in 1569 when the king granted a house in Odense to hold the *landsting* for Fyn while admonishing the inhabitants that they were to be responsible for its future upkeep.¹⁰ That they failed this obligation is implied by a permission dated 1628 to hold *ting* in the judge's barn and, a couple of years later, in a room in Odense hospital.¹¹ From Sjælland there is a 1589 permission to use the north chapel of Ringsted Cathedral as the courthouse for the *landsting* since there was no courthouse at that time, though a courthouse was constructed within the next decades.¹² Again in the case of Lolland, such construction work did not take place: in 1641 the *landsting* was transferred to the city hall in Maribo and the inhabitants were commanded to contribute to its future maintenance.¹³ On the island of Gotland (off the coast of present-day Sweden) there was a special house for the *landsting* and in 1637 the central administration sent a missive to the island's *lensmand* instructing him that in future each sentence had to be paid for and that the money raised must be used for maintaining the building.¹⁴

⁸ DRL 3:13, § 37, with a demand in § 38 that every landowner was to contribute 2 *skillinge* for their construction.

⁹ See DD 2:5:229 (1302).

¹⁰ KB 1566–70, p. 473 (1569).

¹¹ KB 1627–29, p. 538 (1628); KB 1630–32, p. 593 (1631).

¹² KB 1584–88, p. 167 (1584); KB 1630–32, p. 591 (1631).

¹³ KB 1640–41, p. 605 (1641).

¹⁴ CCD 4:590 (1637).

The earliest and by far the most extensive mention of a courthouse in which a *landsting* assembled is found in Viborg. In 1552 the king commanded that St John's Church should house the *landsting* for Northern Jylland from that time on.¹⁵ This was relatively close to the Reformation and the king appears to have thought that the main town of Northern Jylland had a sufficient number of Lutheran churches to service the newly converted citizens. Later the church does not seem to have been large enough—or the cathedral town might have needed an additional parish church—because in the middle of the 1560s a subscription was initiated to construct a new courthouse, but this effort seems to have suffered a decisive setback in 1567 when the central administration commanded that the money that had so far been raised be used to rebuild a burnt-down school in the town.¹⁶ After this, the subscription seems to have ground to a halt, for which reason the king allowed the old bishop's mansion to be used as seat of the *landsting* in the future.¹⁷ The work to renovate the bishop's mansion and adapt it to its new purpose seems to have dragged on for the next many years for the king regularly emphasised to the provincial nobility, religious chapters and boroughs that they had to contribute to the 'new' courthouse's modification and upkeep by either contributions of money or in kind.¹⁸ These royal exhortations appear to have helped the work along by raising the necessary means and the courthouse saw use in the final years of the sixteenth century (but the upkeep does not seem to have received any attention because in 1630 the local people had to request permission to levy additional fees for letters and sentences for the next eight years in order to repair the dilapidated courthouse).¹⁹

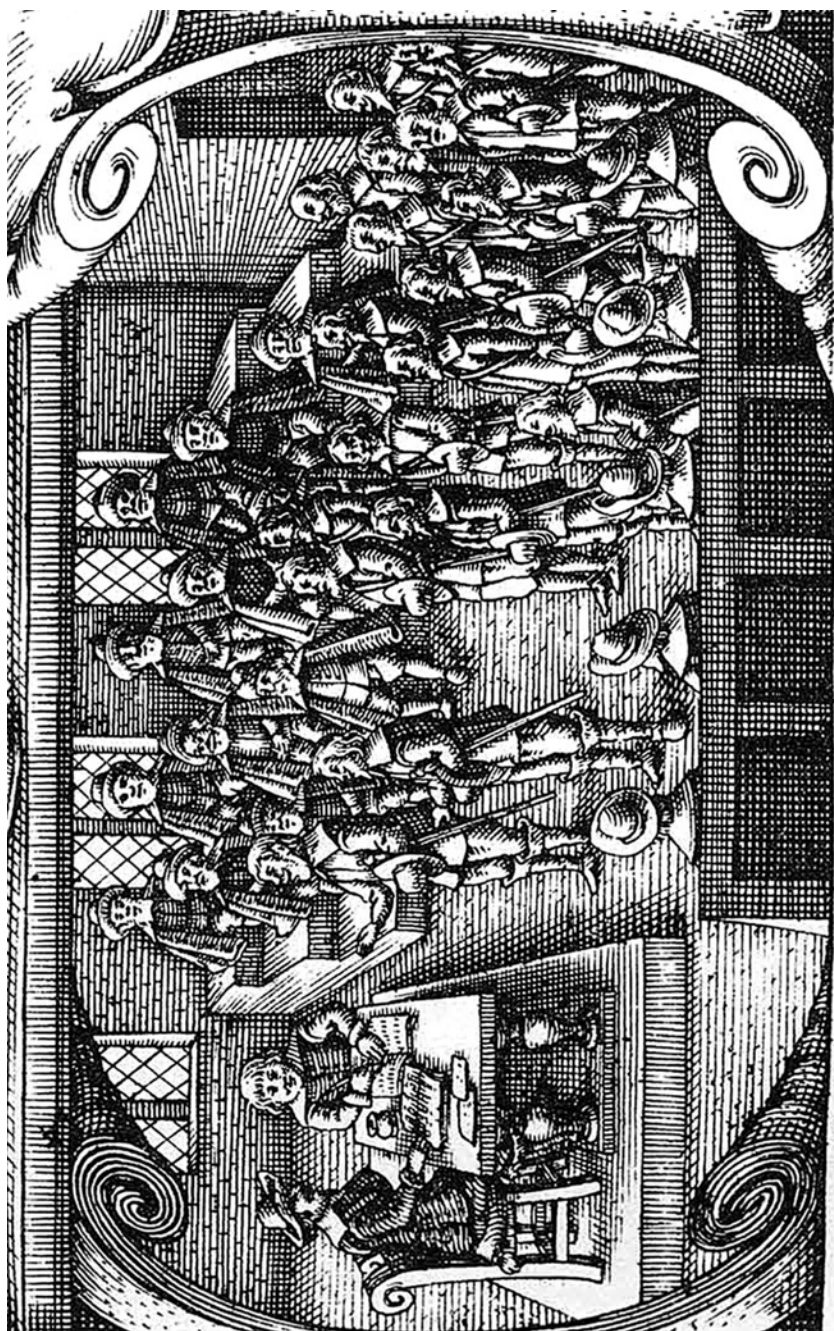
¹⁵ KB 1550–55, p. 168 (1552).

¹⁶ KB 1566–70, pp. 216–217 (1567).

¹⁷ CCD 2:44 (1576).

¹⁸ KB 1584–88, p. 167 (1584); KB 1584–88, pp. 221–222 (1585); KB 1584–88, pp. 668–669 and 781 (all 1587); KB 1588–92, pp. 147, 220–222, 309 (all 1589); KB 1588–92, pp. 455 and 485 (1590); KB 1588–92, p. 610 (1591); KB 1588–92, pp. 757 and 902–904 (1592); KB 1593–96, pp. 124 and 147 (1593); KB 1593–96, pp. 302 and 344 (1594).

¹⁹ KB 1630–32, pp. 251–252 (1630). In subsequent decades the permission to raise extra dues—which since 1639 were also intended to cover the cost of a public house in which weddings, funerals and other congregations could take place—was repeated again and again because of the need for such structures to be maintained, see KB 1637–39, p. 659 (1639); CCD 6:429/KB 1642–43, p. 106 (1642); CCD 6:69/KB 1652, p. 109 (1652).



III. 3. Scene from a *landsting*, i.e. a provincial court, in the seventeenth century.

Both the problems surrounding the holding of the *landsting* and the construction of courthouses reveal that it was not until the Reformation, and especially from the late sixteenth century, that the Danish central administration was able to complete such efforts—but this did not mean that these instructions, for example when they had to raise money, were slavishly observed by locals. When we consider the centralisation of royal authority post-Reformation, it is likely that conditions in the late Middle Ages must have been more haphazard and dependent on variations in regional interests and power politics.

This is also clearly seen in other functions that were shared by the courts. The primary task of the *landsting* was to function as a legal institution, but they could also be a forum for the exchange of information, the venue for the publication of new laws, the raising of taxes, etc.,²⁰ or they could serve more purely political functions.²¹ Among the latter, which we may presume originally included the right to raise the *leding* (the military defence at sea) and propose or accept royal legislation, the primary function was to elect the king. This was a right that undoubtedly originated far back in time as a consequence of a previous, more insecurely founded, central power than the one we see in the High Middle Ages. Even during the reign of Eric of Pomerania (as co-regent with Margrethe I 1396–1412 and as sole ruler 1412–1439) the ‘election’ or recognition of the new king by the three great *landsting* was a legally decisive act—even though this was not explicitly required—but later the Council of the Realm’s acclamation of the king when he had provided a coronation charter replaced the *landstings’* role in the election of the king.²² In return, various kings from the beginning of the sixteenth century appear to have turned to the more popular element, which could be provided by the *landsting*, when the

²⁰ See for example KB 1556–60, p. 238 (1559); KB 1566–70, pp. 108 and 126 (1567); KB 1576–79, (1576); KB 1576–79, p. 261 (1577); and the mention of ‘court knights’ in connection with the *herredsting* in the last chapter. See also KB 1580–83, pp. 280–281 (1581) and KB 1566–70, pp. 249–250 (1567).

²¹ A good example of a political-diplomatic office is found in 1308 when King Eric VI Menved’s brother, Duke Christopher of Sønderhalland (king 1320–1326 and 1330–1332)—who the year before had joined Eri’c’s Norwegian and Swedish enemies, see Skyum-Nielsen, *Fruer og vildmænd I*, pp. 146–152—requested the provincial court of Sjælland to act as a negotiator with the king so that Christopher could obtain safe conduct to the peace negotiations that were ongoing between King Eric and his Nordic enemies, see DD 2:6:123.

²² Jørgensen, *Dansk Retshistorie*, pp. 262–264.

king could not raise support for new initiatives from the Danehof or the Council of the Realm.²³

With regard to the legal activity of the *landsting*, we do not possess an overall view of the distribution of cases. However, we can see from the surviving seventeenth-century act books from the *landsting* in Viborg that about 26% of the caseload dealt with penal law while civil law cases made up the remainder. Only a few penal cases were appealed to the royal court of law and only a very small proportion of these were changed on appeal. In other words, the provincial court judges seem to have defined the legal practice in penal cases, at least after the Reformation.²⁴ The reason for this of course was primarily the rule first found in the provincial laws that such legal cases were to be heard by the *landsting* as the first instance, but in addition we find that after the Reformation a number of defined cases were to be transferred from local courts to the provincial courts before sentences could be executed, for example in cases of magic from 1576, in debt cases involving the nobility from 1623 and in cases of homicide from 1636.²⁵

A breakdown of types of cases contained in the act books of the *landsting* in Viborg covering the period 1569 to 1805 shows that only 3.8% of 16,249 cases heard by the *landsting* dealt with the administration of justice, that is that they complained about the administration of justice or its absence. Out of these cases, 39.3% dealt with issues of warning and summons (of creditors, absconding spouses, etc.), 17.4% dealt with evidential disputes (evaluations of damages and property, witness accounts and such like), 13.3% concerned expenses for sustenance (that is the costs of a *ting* case, travel expenses, time-wasting, etc.), 11.6% dealt with complaints concerning the personnel of the court (not convening on *ting* days, the king's right to depose a local official, authorisation of the local scribe to pass sentences, attacks on summoners, etc.), 9.8% of this small number of cases that dealt with the

²³ Lerdam, *Kongen og tinget*, pp. 226–228. Most common was the summoning for a meeting of the estates, see Olesen, “Middelalderen til 1536”, pp. 28, 31, which happened infrequently from the middle of the fifteenth century until the introduction of absolutism in 1660.

²⁴ Johansen, “Den danske adel og retsvæsenet”, pp. 559–561.

²⁵ Jørgensen, *Lokaladministrationen*, pp. 38–39, quoting CCD 2:43, § 3 (1576); KB 1621–23, pp. 555–556 (1623); CCD 4:563, § 1 (1636). It was decided in 1622 that noble deeds, mortgages, etc. were to be read aloud at the provincial court and that they should be entered into act books, see KB 1621–23, p. 414 (1622).

administration of justice were general complaints about this administration, for instance concerning the absence of act books, decisions regarding jurisdictional matters, about absenteeism, defaulted rights to initiate a case, the forced participation of freemen in executions, etc. In addition to this, we find a small number of minor problems concerning jurors, *sandemænd* and disputes over arbitration. In addition to the 3.8% of cases that dealt with the administration of justice we find another 0.7% that dealt with private apprehension, public arrest, gaoling and perjury. Thus about 4.5% of the total post-Reformation caseload in Viborg can be seen to have been initiated by a party who felt they had been unjustly treated by the administration of justice.²⁶

This was, as already indicted, a period in which the central administration was heavily involved in unifying and controlling the administration of justice at the provincial courts.²⁷ So in and of itself this does not tell us much about what went on in the Late Middle Ages. A very cautious application of the same trends to previous centuries indicates that cases at the *landsting* rarely dealt with procedural problems explicitly.

A good part of the explanation for this is firstly that legal disputes concerning such problems only arose when a case was completed or had been prevented from reaching its completion, i.e. that the cases that were heard by the *landsting* that dealt with problems concerning the administration of justice by their very nature had to be appeals against the decisions of the local *ting*.

Secondly, the figures indicate that the question of correct summoning, either by publication or by direct summons or the summons itself, was indubitably the aspect of procedure that caused most problems.

Thirdly, it appears that the comparatively high number of complaints about local *fogeder*, judges, jurors and scribes, which I mentioned in the previous chapter, also in many cases meant that the losing party appealed against those members of the *ting* who were involved in the administration of justice. There were more appeals that dealt with proof and costs against one of the parties, but since these subjects were either decisive factors in the evaluation of the truth of the two parties' cases or could be an unexpectedly high consequence of having

²⁶ See Henningsen, Johansen and Tamm, "16.000 jyske domme", pp. 249–250, 252–268.

²⁷ In which they seem to have been successful, see Andersen, *Studier i dansk proceshistorie*, p. 209.

initiated and lost a case it is not surprising that these kinds of cases are so frequently found amongst appeals.

The thoughts presented here concerning the order, organisation and use of the *landsting* are presented on the basis of a comparatively weak foundation of sources since our source material comes from mainly after the Reformation. But we are on more firm ground when considering the offices that developed in the regional *ting* in the fourteenth, fifteenth and sixteenth centuries. I shall now turn to these offices to show how central power in time gained more and more influence and control over what happened at the provincial courts. The first office that I shall present is the introduction of a president of the *ting*, which later developed into the provincial court judge.

The Provincial Court Judge

As mentioned in the last chapter, there is no indication in the earliest source material that there was a formal head of the *ting* in the Danish realm. This does not mean that there was not some sort of governance, or that there was not one person who would initiate or preside over proceedings or announce new statutes that must have come to the *ting* from the royal central administration—it must always have been necessary to have some sort of leader of the *ting* meetings who would make sure that all cases were heard and all necessary subjects were examined. It is very likely that such governance would have been the responsibility of the most well-regarded local men, whether because of their venerable age or high social standing, or because they were the most powerful local magnates. The latter situation fits well with the first person to be mentioned in the royal diplomas as the leader of a *landsting*, namely Duke Canute's son Eric who presided over the *landsting* in Ringsted in 1279.²⁸

Henrik Lerdam has shown that from the start of the fourteenth century leaders of all three major *landsting* can be found in the sources²⁹ (and a little later also in the minor provinces).³⁰ Lerdam also makes it

²⁸ DD 2:2:385.

²⁹ On Sjælland from 1302, in Jylland from 1320 and in Skåne from 1333, see DD 2:5:229, DD 7:170 and DD 2:11:22 and 23.

³⁰ On Fyn 1384 and on Lolland 1373, see DD 4:2:432 and 3:9:317, while we have to wait until the middle of the fifteenth century for Langeland, Bornholm, Blekinge,

clear that there were significant regional differences in the social background of these leaders of the *landsting*: in Jylland they were mainly gentry with a few years of court experience; on Fyn they were recruited from even more humble origins; on Lolland they were gentry; on Sjælland they started out as gentry but during the reign of Valdemar IV (r. 1340–1375) we also see a few magnates who simultaneously held office as royal tenants-in-chief (later *lensmænd*) and leaders of the *ting* and at the same time their appointment in this office became longer; and in Skåne they were either gentry or citizens of Lund.³¹ We do not know much about how the appointment took place and who made the appointment because we have examples of both royal nominations and of appointments made during the interregnum (1332–1340), in other words they were appointed without royal authority. It is, however, very likely that contemporary power-politics decided who made the appointment and who was appointed to be a leader of or judge at the *landsting*.³²

This changed around 1396 when King Valdemar IV's daughter Margrethe—who styled herself the Duchess of the realm of Denmark (which is why she has always been referred to since then as Margrethe I)³³—managed to have elected and crowned the minor Eric of Pomerania, the son of her niece, King of Denmark and Sweden (r. 1396–1439) and King of Norway (r. 1389–1442). After 1396 the leaders of the *landsting* were all magnates, some of them were even members of the Council of the Realm and most of them held their office for decades.³⁴ The change in such appointments could well be a consequence of a policy according to which magnates supported the uncertain power of a minor, foreign, king in return for offices that formally speaking positioned them as a part of the highest level of the legal court hierarchy.³⁵

This mutual cooperation may well be the explanation behind the terminology and hierarchy found in the *landsting* of Viborg, as described in Margrethe's statute of 24 January 1396, according to which Margrethe, acting for the king, appointed the nobleman Jens Nielsen

Nørrehalland and Sønderhalland, see Rep. 1:3:7320, 7333, 7467, 7534, 7695a, 7703, 7704, 7705, 7770 and 7819.

³¹ Lerdam, *Kongen og tinget*, pp. 203–211.

³² See Lerdam, *Kongen og tinget*, pp. 211–215, 220–226.

³³ Skyum-Nielsen, *Fruer og vildmænd II*, p. 115.

³⁴ Lerdam, *Kongen og tinget*, pp. 215–220.

³⁵ Regarding the public acclamation of Margrethe I and the enthronement of Eric of Pomerania, see Skyum-Nielsen, *Fruer og vildmænd II*, pp. 113–125.

Løvenbalk to be the provincial judge of Northern Jylland.³⁶ This was the first time that the term *lantzdømer* (*rector placiti generalis*)—a term that was commonly used in other parts of the country as early as 1302³⁷—was used in connection with Jylland, as was the case for the almost identical statute that was issued for the island of Fyn on the same date.³⁸

Until then, the person who functioned as the judge of the *landsting* in Jylland had been entitled the ‘hearer’ of the *landsting* (*auditor placiti generalis*).³⁹ Even though the *auditor* thus now became a subordinate to the provincial court judge, he appears to have continued as the daily leader of the *landsting* and he is often mentioned first—when the provincial court judge appears not to have been present—in court records, in other words the *auditor* was the substitute for the provincial court judge when the latter attended meetings of the Council of the Realm or the royal court of law.⁴⁰ The introduction of the office of provincial court judge can thus be taken as evidence for an increasing centralisation of sentencing power in one person closely associated with royal power and it is therefore not surprising that provincial court judges remained in office for significantly longer periods than the *auditores* of Jylland, in fact they sat for several decades in contrast to the *auditores* who only held office for a few years.⁴¹

Even though there was thus agreement on Sjælland and Jylland that the highest holder of office at the *landsting* should have the title of judge of the *landsting* (and that this official had a substitute under him who had the title of *auditor* in Jylland) this was not the common terminology throughout the realm. Lerdam is right when he claims that the officials on Fyn that were designated *auditor* were the supreme (and also the only) leaders of the activities of the *landsting* on Fyn in

³⁶ DRL 1:35, post § 17.

³⁷ Lerdam, *Kongen og tinget*, pp. 206–209 and 217–218. For Sjælland he is characterised in 1302 as “iudex placiti terre Syalandie substitutus”, see DD 2:5:229, i.e. a substitute provincial judge.

³⁸ DRL 1:36, § 4.

³⁹ Lerdam, *Kongen og tinget*, pp. 204–205.

⁴⁰ See Lerdam, *Kongen og tinget*, p. 216. That there really were two different offices is clear from, for example, Rep. 1:3:5988; Rep. 2:4:6606 and 6715; 2:5:8536. There are also numerous examples that the provincial court auditor acted as a first man during the fourteenth and beginning of the fifteenth centuries, see for example Rep. 2:1:1009, 1023, 1502, 1577, 1578 and 1821; Rep. 2:2:2477 and 4242; Rep. 2:3:5252; Rep. 2:4:6811; Rep 2:5:8755.

⁴¹ Lerdam, *Kongen og tinget*, pp. 215–220.

the fifteenth century and that the titles used by and large were not quite settled.⁴² We find the same plurality of terminologies when we contemplate titles in other provinces, especially the very changeable Skåne.⁴³ Thus the supreme leader of the *landsting*—in addition to being called ‘provincial court judge’ and ‘provincial court auditor’—is styled ‘auditor of cases for the *landsting*’ in several connections.⁴⁴ We have to go as far as the second half of the fifteenth century before we find a certain measure of stability in the terminology used concerning the leader of the *landsting* in Skåne, namely *lantzdømer*⁴⁵ (although they were later also called ‘lower judges’ when compared to the royal court of law).⁴⁶

Social Background and Salaries

By the end of the fifteenth century it was common for the leader of the *landsting* to be a member of the high nobility. Although the first mention of a provincial court judge on Sjælland dating from 1302 makes it plain that the judge did not pass the sentence but confirmed the *ting*’s verdict in the king’s name,⁴⁷ the many later sentences show evidence that this leader (who during the fifteenth century was entitled *lantzdømer* across the entire realm) possessed a sentencing function sometimes by himself and sometimes with fellow or lay judges.

We do not know the medieval appointment procedure, but around the Reformation it seems to have been increasingly standardised.⁴⁸ If the central administration did not have a preferred candidate, then firstly the *lensmand* nominated a candidate and then the appointee

⁴² Lerdam, *Kongen og tinget*, p. 217.

⁴³ See Lerdam, *Kongen og tinget*, p. 219.

⁴⁴ See for example Rep. 1:3:7333 and 7467; Rep. 2:1:976; Rep. 2:2:2376, 2904 and 3527; Rep. 2:3:5255.

⁴⁵ See for example Rep. 1:3:7534 and 7703; Rep. 2:1:212, 222, 598, 721, 899, 1025, 1079, 1086, 1166, 1263, 1282, 2026, 2181, and 2186; Rep. 2:2:3837, 3888, 4241 and 4320; Rep. 2:3:4847; Rep. 2:5:9175 and 9625; Rep. 2:6:10792 and 10941; Rep. 2:7:11761. In the case of diplomas from Sjælland there is a tradition that a diploma is introduced by the name of the judge followed by his office “who sat in the place of the provincial judge in Sjælland.” Such a description could be interpreted as an expression that he was a substitute but if that was the case the surviving diplomas do not document the presence of a single provincial judge: the phrase is so common that it is seen in every single diploma issued by the provincial court.

⁴⁶ See for example KB 1648, p. 101 (1648).

⁴⁷ DD 2:5:229.

⁴⁸ See for example KB 1550–55, pp. 18, 50, 54 and 85 (all 1551).

produced an oath to the king, either in person or as represented by either the *lensmand* or a member of the Council of the Realm who was present in the region if it was thought that the appointee lived too far from Copenhagen.⁴⁹ It was usually in connection with this oath that the judge received his 'salary', which could consist of either peculiar rights, an exemption from military duty, free living quarters, 'judge's corn' or—which without a doubt was the most common—a *len* to be held for the period of his appointment.⁵⁰ It was not until the beginning of the seventeenth century that we see a salary being paid.⁵¹ After the appointment, a letter patent was issued to the inhabitants of the province informing them that a new provincial court judge had been appointed and confirmed. Occasionally this was supplemented by an additional copy of the letter given to the judge himself.⁵² Given the attention that the central administration paid to the standardisation and control of provincial judges after the Reformation, it is very likely that the practice that we see in the sixteenth century was comparatively new for there is nothing like it in the surviving sources from previous centuries—the medieval practice surrounding these appointments was probably more ad hoc and decided by local relations of power.⁵³

In contrast to the fifteenth century, when all provincial judges were appointed from amongst the higher nobility, the provincial judges who were active just after the Reformation were in general recruited amongst the gentry. The reason for this was apparently that the office was neither prestigious nor well paid at this time, but it is probably also significant that the central administration was better able to control the administration of justice and its 'public' administration by appointing officials who were from the economically weaker and therefore more subservient gentry than the possibly more self-assured

⁴⁹ See for example KB 1571–75, p. 698 (1575).

⁵⁰ See for example FFR p. 3 (1523), 13 (1523), 342 (1532); DKR, p. 94 (1535), 313 (1546), 328 (1547), 345 (1547); KB 1550–55, pp. 18 and 49 (1551); KB 1550–55, p. 150 (1552); KB 1550–55, pp. 387–388 (1555); KB 1556–60, p. 99 (1557); KB 1556–60, pp. 219, 232, 236 (all 1558); KB 1556–60, p. 433 (1560); KB 1561–65, p. 76 (1561); KB 1561–65, pp. 152 and 176 (1562); KB 1561–65, pp. 316–317 (1563); KB 1561–65, p. 692 (1565).

⁵¹ See KB 1609–15, pp. 829 and 831 (1615).

⁵² See for example DKR p. 123 (1539), 258 (1542); KB 1556–60, pp. 131 and 135 (1557); KB 1561–65, pp. 65–66 (1561); KB 1561–65, p. 197 (1562); KB 1571–75, p. 698 (1575).

⁵³ See Andersen, *Studier i dansk proceshistorie*, pp. 213–215.

and independently minded higher nobility. The disturbances and the civil war that took place around the time of the Reformation doubtless also limited recruitment possibilities amongst the small group of higher nobility who could be considered for such posts, so the change in appointment practice could also simply reflect this changed situation because later in the sixteenth century the higher nobility once again dominated the office of provincial judge. Around this time, when the central administration started to have more control over society and the legal system, it was clearly also more opportune to have a better-educated pool of candidates than those available around the 1530s because, while it is apparent that a policy was initiated to separate the two offices and their individual functions early in the sixteenth century,⁵⁴ the office of provincial judge was increasingly used as a way onto the royal court of law and from thence to the Council of the Realm in the period around 1600.⁵⁵

Single Judge or President of the Court?

As we saw in connection with the official of the local *ting*, the *foged*, it is not until the start of the seventeenth century that the sources allow us to argue that the he functioned as the sole judge at the *herredsting*. In the following I will examine more closely the situation at the *landsting*. The starting-point for the activities of the provincial judge was of course the law of procedure, which was prescribed in the *landsting* and subsequently revised by later legislation, particularly legislation passed after the Reformation of 1536. Of course this meant that a sentence that was passed in a case was (mainly) given because of the *sandemænd* and jurors' evaluation of proof produced by the parties. Thus, through the centuries, we find mentions of different jurors, particularly *sandemænd*.⁵⁶

Only a handful of sources that give an insight into the activities of the provincial judge survive from the sixteenth century, but these

⁵⁴ Whether this was a conscious policy is difficult to decide, but the central administration did try to keep track of provincial judges, see for example a list of such judges from 1559, see KB 1556–60, p. 238.

⁵⁵ E. Ladewig Petersen, "Landsdommerkorpset under adelsvælden. Rekruttering, karrieremønstre og status", *HT* 93 (1993), pp. 279–294; Johansen, "Den danske adel og retsvæsenet", pp. 569–570.

⁵⁶ See for example Rep. 1:3:6794 (1435); Rep. 1:3:5940 (1421); Rep. 2:1:2053 (1466); DRL 3:1, § 36 (1513); FFR, p. 6 (1523); KB 1550–55, p. 411 (1555); concerning *drabsnævninger* (homicide jurors) in Skåne and Sjælland see CCD 2:43, § 7 (1576).

confirm the impression from the *herredsting*, namely that the leader of the *ting* (the provincial official or the provincial judge) may have been the president but that he was not solely responsible for the sentence in a case. His function as a leader is demonstrated by a case in 1416 in which a provincial judge requested a knight to elect eleven other jurors in order to determine a case of debt, after which the judge passed sentence on the question and the consequences of this decision.⁵⁷ In 1462 the provincial judge on Lolland appointed a provincial jury to decide a dispute over boundaries, having been instructed to do so by the king.⁵⁸ We get more information from a copy of a sentence witnessed and signed by the provincial judge in Viborg in 1452 in which he writes “then it appeared to me and to the good men in the *ting* and we pronounced this to the *ting* that . . .”⁵⁹ This document shows that the case may have been decided by the provincial judge with a number of unnamed assistants, co-judges or just members of the *ting* in general—which, following the spirit of the provincial laws, secured local support and probably also local help to carry out the sentence—but that it was only the provincial judge who pronounced the sentence.

Surviving documents from the sixteenth century appear to confirm this. In Christian II’s 1522 Land Law we learn that the provincial judge and assistant judges were obliged under pain of fine to appear while the provincial judge had the possibility to personally issue a letter to an outlaw stating that his case was being investigated (if this was the case).⁶⁰ The mention of assistant judges, however, implies that apparently in some cases the provincial judge had the competence to pass sentence on his own, but that it was far from all cases for which he had this power. This is an impression that is confirmed by other parts of the 1522 Land Law, although it did not specify which cases.⁶¹

⁵⁷ Rep. 1:3:5622 (1416).

⁵⁸ Rep. 2:1:1490 (1462).

⁵⁹ Rep. 2:1:212 (1452).

⁶⁰ DRL 3:13, §§ 43 and 58 (1522).

⁶¹ See DRL 3:13, §§ 57 and 70, in these it is clear that the provincial judge in some cases is joined by assistants whose role is not defined. In the jurisdictions of Fyn and Jylland they could appear in homicide cases, see FFR p. 6 (1523), where the king commanded everyone to cease feuding on Fyn until the *sandemænd* had decided in the case.

After the Reformation the provincial judge passed sentence with 'several good men'⁶²—in some cases a local nobleman,⁶³ in other cases a locally resident member of the Council of the Realm who from the end of the sixteenth century were commanded to participate in the *landsting* at least twice a year in order to ensure that justice was done.⁶⁴ The appointment by royal statute of two provincial judges in Jylland in the early 1550s is an expression of the same trend. Traditionally there had previously been two such judges in Skåne and on Sjælland.⁶⁵ The reasoning behind this seems to have been that the more judges or qualified assistant judges there were the better the chances were that justice would be done. This reasoning was also behind Christian II's demand that all judges should attend Mass before they presided over the *ting*.⁶⁶ The surviving sources from the following century also reveal that it was not until the seventeenth century that the provincial judges gained the authority to sentence on their own: once again it is clear that this increased competence was intimately associated with the central administration's increasing success in controlling the exercise of the judge's power and the administration of justice.⁶⁷

The Provincial Court Scribe

Although we saw above in the analysis of the *herredsting* that some local *ting* had scribes as early as the second half of the fifteenth century, we do not find direct mention of such scribes for the *landsting* until the sixteenth century. They do not attract notice in the surviving sources and overall they have not attracted much attention in current research because unlike the local court scribes they were not based in the local society and therefore were not subject to local scrutiny, as

⁶² Johansen, "Den danske adel og retsvæsenet", p. 558.

⁶³ For example KB 1580–83, p. 517 (1582); KB 1588–92, pp. 92 and 102–103 (1588); KB 1588–92, p. 204 (1589); KB 1593–96, p. 479 (1595).

⁶⁴ See CCD 2:374/KB 1584–88, p. 166 (1584); CCD 2:436/KB 1584–88, p. 536 (1586); KB 1588–92, p. 344 (1590). And the general demand in CCD 2:299 (1582). There are several precedences in specific cases, for example KB 1550–55, p. 78 (1551).

⁶⁵ In Skåne we have at least one example that two provincial court auditors produced an oath of fealty to the archbishop on the same day, see Rep. 1:3:7333, and in Sjælland we find judges' names repeated regularly, but often with several court sessions between them so that it appears that the same judge would not have been presiding over an unbroken series of cases.

⁶⁶ DRL 3:13, § 49.

⁶⁷ Andersen, *Studier i dansk proceshistorie*, pp. 218–222.

happened in some localities. We do however know that they were present in *landsting* before 1522 because in that year they are mentioned in Christian II's Land Law, which gives the impression that the office was not a new one. The 1522 Land Law chapter 42 gives a list of the provincial court scribe's responsibilities—to compose and issue legal documents—and the prices they could charge for their services, and a later chapter adds that the scribe must also note any disturbances during a case and apparently make certain that any fines imposed for these transgressions were given to the local church.⁶⁸

From the middle of the sixteenth century we find increasing mention of provincial court scribes and we learn that the scribe was not only given payment for his activity as a scribe. This somewhat variable income could be supplemented by a part of the tithes, by the provision of free accommodation or by tax exemptions.⁶⁹ However, the scribe's fees for providing legal documents—which were continually adjusted in relation to a number of economic indicators—seem to have been the most common income generator, or at least the major part of the income of the provincial court scribe.⁷⁰ It is thus only from the second half of the sixteenth century that we start to find mentions of how the provincial court scribe sometimes did not correctly enter information into the act books; that there could be tensions in his relationship with the provincial judge; and that the scribe sometimes took over the leadership tasks of the judge (although the central administration vigorously opposed such things). Such occurrences seem to have been less extensive amongst provincial court scribes, but this may be caused in equal proportion by the late introduction of their office and the increased attention to the activities of the *landsting* demonstrated by the post-Reformation central administration.⁷¹

Procedure and Sentencing at the Landsting

In contrast to the *herredsting*, the *landsting* served the function of court of both first and second instance depending on the type of case and

⁶⁸ DRL 3:13, §§ 42 and 48 (1522).

⁶⁹ See for example KB 1561–65, p. 692 (1562); KB 1561–65, p. 534 (1564); KB 1566–70, p. 75 (1566); KB 1566–70, p. 321 (1568); KB 1571–75, p. 677 (1575).

⁷⁰ See the continual adjustments in CCD 1:482, § 4 (1569) and 2:43, § 6 (1576).

⁷¹ Andersen, *Studier i dansk proceshistorie*, pp. 223–225.

person who pursued the case. Procedure remained the same regardless of whether the *ting* was functioning as a court of first or second instance.

Initiating a Case

I have already mentioned that procedure in Jylland and Fyn encompassed the meetings of three *ting* while procedure in Sjælland and Skåne allowed for four meetings.⁷² In a specific case dating from 1477, the first meeting of the *ting* was concerned with publishing the case and summoning the defendant and the defendant's third *ting* meeting (i.e. the plaintiff's fourth *ting* meeting) was concerned with the production of proof for the defendant.⁷³

In this specific case, the second and third *ting* meetings were not mentioned but were simply extra *ting* meetings at which the plaintiff could repeat his publication and summons of the defendant. It thus appears that an oral summons to the *landsting* was common on Sjælland around 1477, just as was apparently the case earlier.⁷⁴ An example of this is found in 1448 where a case of outlawry was "examined and proven" at the *landsting* of Lolland, following which the *lensmand* secured the witness of twelve men that the culprit had been correctly summoned and therefore had been given the proper possibility of defending himself and finally "the provincial judge left the *ting* and consulted with us", i.e. with those members of the *ting* who must have functioned as jurors.⁷⁵

It is clear from Eric's Law for Sjælland and from another case dating from 1466 that the administration of justice on Sjælland allowed for several ways in which a case could be initiated. The case from 1466 lists the ways in which it could be done because the defendant argued, with the help of sworn testimony, that the plaintiff did not legally

⁷² See Rep. 2:2:4283 (1478).

⁷³ Rep. 2:2:4122 (1477). According to the Store Reces of 1643 it appears to have been a common phenomenon that a case lasted for four court sessions, see CCD 5:143, 2:6, § 13, but these most likely point to a special 'love day' or letter of supersendence procedure that was invoked in cases concerning real estate.

⁷⁴ In a single instance in 1330, King Christopher II produced a written complaint at the provincial court of Viborg against Bishop Tyge of Børglum and appealed the case with the seals of other bishops to the pope. But of course this was not a typical way of initiating a case but solely predicated on the need for the case to be heard by the curia, see DD 2:10:243.

⁷⁵ Rep. 1:3:7819 (1448).

summon him to the *landsting*, having used neither the *foged* or other members of the local *herredsting* nor a written summons from a provincial judge nor other legal warning.⁷⁶ The references to the official and others at the local *ting* level refer to the possibility of summoning a defendant to the *landsting* by public declaration in the local *ting* while the mention of a written summons by the judge of the *landsting* refers to a private summons delivered at the *brofæl*, i.e. at the defendant's abode. The possibility of legal warning refers to the possibility of publicly announcing the case in the local *ting* by repeating it a set number of times in the expectation that the defendant would either be present at the publication or would be informed by others about it. Finally we see that the common proof of legal summons is provided by the testimony of those present, a kind of proof that according to the provincial laws could not be disproved.⁷⁷

This plurality of procedure appears to have been a thorn in the side of the central administration because Christian II's 1522 Land Law limited it to include only private summons. In the 1522 Land Law's chapter 51 we learn that an intending plaintiff must request two witnesses and one literate person to seek out the defendant to read and announce a previously composed summons containing the name of the plaintiff, the subject of the case and the date, time and place for a *ting* meeting. The three summoners were to keep the written summons as proof since the defendant might claim not to have been summoned.⁷⁸ Subsequent chapters contain rules for time limits: how soon before the meeting a summons could be presented (which depended on where the defendant lived and which *ting* he was summoned to) and rules concerning the consequences of malicious summons. If a

⁷⁶ Rep. 2:1:2026 (1466).

⁷⁷ See also Rep. 2:4:7909 (1495), and see Rep. 2:4:7570 (1494).

⁷⁸ DRL 3:13, § 51 (1522). The set formula was: "Ieg N. wtii then och N. y samme stedt, thedz thienere, bekiende met thette wort obne breff, att then dag vare vii tilbedne aff N. wtii then bye N. att lade læsze konninglige mayestadt, wor kiæreste naadige heris steffning offuer N. wtii then N., huilchet wy lydeligen och obenbare lade forkynde och lese for hannom paa then stedt, nerverendes the och the; thet til widnisbyurdt thrøche wy wore indzegle neden for thette wort obne breff medt vor handschrift, som her wunderschreuit er." ("I, N living in X, and N in the same place... make public with this our open letter that on this day we were summoned by N in the town of N to let the summons of the royal majesty our dearest gracious lord concerning N in the N, which we loudly and publicly let proclaim and be read for him in that place in the presence of he and he; to witness this we imprint our seals below this our open letter with our signature which is written below.")

plaintiff maliciously summoned a defendant they had to pay a fine of forty marks to both the king and the defendant and a daily allowance for sustenance to the defendant, which was graded according to his social status.⁷⁹ The latter rules were not new, but they had not been found in the context of new laws for many years.

The severe sanctions against malicious summons were intended to avoid time wasting. Another way to ensure an efficient administration of justice at the *landsting* was suggested and carried through by legislation around 1570. In appeal cases the provincial court judge could pronounce a decision in clear words at the first meeting of the *ting* to avoid summoning witnesses, *sandemænd* and others to the *landsting* and thus avoid dragging out the case to the disadvantage of people short of money for the trial.⁸⁰ It was at the same time that the plurality of methods of summons were replaced by one method, i.e. written summons, at least in Jylland. As a consequence, it was only the provincial court judge or the provincial court scribe, and not the parties themselves as had previously been the common practice, who wrote the summons to secure that it was also registered in the acts of the *ting* so that the judge was prepared to hear the case on a specific *ting* day. 2nd June 1573 saw the outright prohibition of private summons and anyone who transgressed against this rule was to compensate the illegally summoned defendant for his sustenance in connection with his appearance at the *landsting*.⁸¹ However, from time to time, when the defendant could not be found, summons continued to be announced at the local *ting* in order to secure that they were publicly known.⁸²

This development clearly demonstrates that it was problematic to introduce written procedure in Denmark and to secure a swift and uncomplicated initiation of cases.

The Conduct of Cases and Means of Proof

The parties intending to prove their positions appeared with the required proofs at either the second, third or fourth meeting of the *ting*. At these meetings the parties and their witnesses were questioned and other kinds of proof were examined to enable the jurors and/or

⁷⁹ DRL 3:13, §§ 52–53 (1522).

⁸⁰ See both CCD 1:482, § 3 (1569), and CCD 2:43, § 4 (1576).

⁸¹ KB 1571–75, p. 275 (1573).

⁸² Andersen, *Studier i dansk proceshistorie*, pp. 227–229.

the judge to establish the truth of the matter. The practices that are mentioned in late-medieval sources (and to a large extent the post-Reformation sources) leave no doubt that the central element in procedure was to question the proofs and evaluate the proofs that had been produced in relation to each other. The earlier use of the so-called *Beweisurteil* in which a counter-proof in itself settled the matter had clearly been superseded since the parties were questioned by either the jury or the judge⁸³ or the parties questioned each other and argued against the proof produced by the opposing party.⁸⁴ Of course this also meant that the previously commonly used compurgators became a rarity, although they did occasionally appear in the *ting*.⁸⁵ Their use was formally regulated in the seventeenth century when it was allowed that an oath of denial could be imposed by the judge if he found this necessary to ensure that the demands of the law and of rights were met. This apparently happened when the plaintiff could not prove the culpability of the defendant but could produce circumstantial evidence because in such cases the defendant was granted the possibility of swearing himself free with an oath.⁸⁶ Thus focus centred on substantial proof, which was intended to substantiate the position of a party, and from the end of the sixteenth century it became increasingly common for a judge to summon new witnesses in an attempt to establish the truth and to gain a better understanding of a case and its context.⁸⁷ (A related development was that the punishment for perjury was increased at the end of the seventeenth century so that perjurers were punished “on their fingers”, i.e. symbolically lost the two fingers with which they had sworn an oath.)⁸⁸

⁸³ See for example Rep. 1:3:6600 (1433); DRL 3:13, §§ 58, 61–62 (1522).

⁸⁴ See for example Rep. 1:3:7383 (1443); Rep. 2:2:2756 (1470); see also the unique example from 1505, in which an attorney for a noblewoman possesses a personal archive containing the witness accounts, see Rep. 2:5:10538. Other mentions of the same case can be found in Rep. 2:5:10330, 10335 and 10365.

⁸⁵ See the relatively rare examples Rep. 1:3:5324 (1417); Rep. 1:3:5473 (1417); probably also Rep. 1:3:5656 (1417); VLD 1616A:100; VLD 1618A:201. For *kønsnævn*, see for example Rep. 2:2:3753 (1475); CCD 5:143, 2:6, § 21 (1643).

⁸⁶ CCD 5:143, 2:6, § 20 (1643).

⁸⁷ See for example DRL 3:13, § 66 (1522); KB 1593–96, pp. 427 and 456 (1595). See also Rep. 2:2:3837 (1476).

⁸⁸ See KB 1627–29, p. 837 (1629); KB 1630–32, p. 564 (1631); KB 1630–32, pp. 690, 905–906, 850 (all 1632). See Andersen, *Studier i dansk proceshistorie*, pp. 229–230, for examples of this in practice.

Many of these characteristics conform to European patterns, but formally speaking Danish jurisprudence did not allow for circumstantial evidence to decide a case on its own and in this Danish legal practice diverged from the learned law in which strong circumstantial evidence would have permitted interrogation under torture and a possible confession. In the same way, Danish practice was to a very large degree based on oral presentation since a literate culture was still not the norm. In connection with the local *ting*, we see an increasing number of documents from around 1400 because paper allowed for cheaper reproduction costs than parchment. In 1396 a case from one of the *landsting* shows that documents were being produced as proof by one party, but unfortunately for him the provincial judge decided that the three letters issued by Queen Margrethe I were invalid because a cruciform incision had been made in the middle of each, for which reason the provincial judge demanded that the royal seal be removed.⁸⁹

This was far from the only time that such an occurrence took place because documents and letters were increasingly mentioned as proof in property transactions and similar⁹⁰ and their increased significance appears to have led to a more extensive misuse and more forgeries. We find an extensive distrust about the value of documents (and lower court sentences) as proof well into the seventeenth century if they did not show signs of use, were missing a proper date, signature or seal or had not been properly, publicly, registered.⁹¹ For the same reason we find decrees at the beginning of the seventeenth century demanding annual publications of deeds, donations and loan documents granted to the nobility so that they would be commonly known and thus more easily proven.⁹²

The reason for this was that in the later Middle Ages the *tingvidne*, i.e. witnesses of the business of the *ting*, who were primarily recruited from amongst the lower gentry living in the locality of the *landsting* and from citizens and clerics living in the town in which the *ting* resided,⁹³ became one of the means of proof that jurors and judges placed greater faith in if they contradicted documents that had not

⁸⁹ DD 4:6:51 (1396).

⁹⁰ See for example Rep. 1:3:5656 (1417) and Rep. 1:3:7383 (1443).

⁹¹ Andersen, *Studier i dansk proceshistorie*, pp. 230–231.

⁹² See KB 1621–23, p. 414 (1622).

⁹³ Lerdam, *Kongen og tinget*, pp. 220–226.

been copied into a public register.⁹⁴ In order to ensure that such evidence could not be contradicted, Christian II's Land Law of 1522 decreed that these *ting* witnesses were to state their names clearly and state when and where they had heard what they gave evidence about.⁹⁵ Towards the end of that century a further decree stipulated that summons and judgements that rendered a person incapable of functioning as a *ting* witness were to be read aloud in provincial and local *ting* every year so that these individuals were not appointed and therefore wasted the rights of others to pursue a case.⁹⁶ Thus it was only at that time that the written entries in the public register carried sufficient weight to make this possible.

Practice from the beginning of the seventeenth century shows what could cause a rejection of written evidence, but the mistrust of written evidence was probably not new. Indeed, it is more likely that it was even greater in preceding centuries when the use of written evidence for court actions was less extensive. A proof of court actions could thus be declared invalid: *when* it had not been produced at the *landsting*; *when* it had been previously disallowed (or was based on a previously disallowed proof of court action); *when* it had not been witnessed by eight auditors of the *ting* or the summons had not been in accordance with law or had been incomplete; *when* the proof of court action was performed at a much later date or had not been correctly entered into a public register. A proof of court action performed long after the event to which it witnessed or produced by biased individual was not declared invalid as a matter of course because in many cases it was explicitly remarked that the defendant did not object to the proof of court action, but on the other hand we can conclude from this that it may have been the defendant's protests against such late or biased proofs of court action that determined whether the *landsting*—which needed to give reasons for their rejection of a proof of court action—rejected a proof of court action.⁹⁷ Thus the practice of the *ting* indicates that the introduction of written documentation in procedure was not regarded as an unconditional good.

⁹⁴ Lerdam, *Kongen og tinget*, pp. 226–234, which quotes DD 2:10:5 (1328); Rep. 1:3:5656 (1417); Rep. 1:3:7819 (1448).

⁹⁵ DRL 3:13, § 71 (1522).

⁹⁶ CCD 2:134/KB 1576–79, pp. 465–466 (1578); CCD 2:322/KB 1580–83, p. 601 (1583).

⁹⁷ See VLD 6, p. 10.

It could of course also happen that the defendant did not appear before the *ting*, and in such cases the degree of reaction changed over time from the clearly defined and graded reaction in the Middle Ages to a somewhat more subjective and equitable practice after the Reformation. An example of the medieval reaction is found in the agreement concerning the conditions of Lolland dating from 1446 in which it was determined that whoever did not appear before the *herredsting* could be summoned to the *landsting* in the same case and that he would subsequently be liable for a fee of three marks for each of the possible three *ting* sessions from which he might be absent. If he did not appear at the fourth *ting* meeting, i.e. the fourth *landsting* after the case had been initiated, the provincial judge was to appoint four men to ride to the defendant's house and "demand him for a capital case and law day and before the royal court of law", that is he lost the case and was liable to pay a fine both for his absence and for the case to the plaintiff and to the king. If he still refused, the four men were to return to the *landsting* and notify it about his refusal and the provincial judge was then to send the king's *foged* with them to demand an additional forty marks, half of which was to be paid to the plaintiff and the other half to the king. If the defendant subsequently resisted them with weapons he was to forfeit his life.⁹⁸

What if the plaintiff did not appear before the *ting*? We find a surviving court record from the *landsting* of Northern Jylland that describes this situation. When the plaintiff or his substitute did not appear before the sessions of the *ting* at which their presence was required, the defendant's substitute read out a document proving that the defendant had offered the plaintiff money to settle the case between them at a meeting of the local *herredsting* in Hedebo: an offer which the plaintiff had refused to accept. Subsequently, the provincial judge decided that the defendant was to go free—"until better proof was produced"—because of the plaintiff's non-appearance and the evidence of the court action at the *ting* of Hedebo.⁹⁹ The decision illustrates two points: That the courts often produced many sentences that were interim decisions made on the basis of the type of proof or its absence and that the consequences were clearly more serious for the defendant if he absented himself from one of the *ting* meetings.

⁹⁸ DRL 2:18 § 1.

⁹⁹ Rep. 2:3:5014 (1482).

At the same time, this example demonstrates that it was possible to drag out a case for a long time if a decision was not desired. It was only when the central power found itself strong enough to deal with the administration of justice in the sixteenth century that action was taken against these delays. Thus it was stated in the 1522 Land Law that the provincial judge could decide a case even when one of the parties was absent.¹⁰⁰ In other words, he had the power to intervene and pass sentence much more quickly than before and to favour the party who appeared before the *ting*.

These changes added new tones to the law, but the Land Law was not valid for a long time so even in the seventeenth century it was not uncommon to find that two or three interim judgements and several six-week postponements were allowed by the *ting* before the judge exercised his power to intervene and pass a final sentence.¹⁰¹

The Day of Judgement

When the proofs had been produced by the parties and the court had investigated them, the ad hoc or permanent jurors—increasingly supplemented by or replaced by the provincial court judge—were to evaluate the proofs and pronounce a decision, following which the leader of the *ting* or the judge could pass sentence and announce sanctions or punishment. These sanctions and punishments were graded according to a tariff fixed by law in contrast to the new kinds of proofs such as documentary evidence and the recently developed methods of evaluation. In practice, this procedural step involved either a request to the jury to leave the *ting* and discuss the case in private or someone—a formal or de facto leader of the *ting*—appointed a member of the *ting* to appoint the rest of the jurors or all of the jurors. We learn from the surviving act books from the *landsting* of Viborg dating from the beginning of the seventeenth century, which incorporated mainly the rules of the Law of Jylland and the Koldingske Recess,¹⁰² that by this time these nominated jurors were charged with coming to a decision,

¹⁰⁰ DRL 3:13, § 56; see also § 57.

¹⁰¹ VLD 5, grp. 31, p. 7.

¹⁰² In some cases supplemented by or replaced by rules from Thord's Articles and the Town Law of Christopher of Bavaria, some ordinances, a privilege granted to the town of Viborg, open letters and missives from the royal chancery, various statutes and memoranda, Frederick II's Farm Law, the coronation charter of 1596 and in just a single case a court decision, see references to the relevant cases in VLD 5, pp. 43–48.

sometimes with the judge or the leader of the *ting* and sometimes on their own.¹⁰³

A proof of court action (*tingsvidne*) dating from 1290 shows that twelve specially appointed men decided a case about fields and wood boundaries at the *landsting* of the island of Møn, and if we presume that there was a certain similarity to the procedure used in other parts of the country, these men, who were elected ad hoc, probably did what their equals in the *landsting* of Sjælland in Ringsted did in 1328 when they passed a decision in a case concerning property:

...when both parties' claims and viewpoints had been considered carefully from all angles and the clear and unvarnished truth finally had come to light with careful observation of the norm of law in every aspect [they] stood forth at the *landsting* of Sjælland where each of them in turn received the book and placing their hand on it calling upon God assured under oath...that what they had decided was right.¹⁰⁴

From the time of Eric VI of Pomerania (r. 1396–1439), surviving *ting* acts bear testimony to the fact that the provincial judge often passed sentence following the decision of a jury, and several sentencing letters were not even composed as court acts but were issued by the judge who explained what he had done and that he had tried to reach the truth of the matter.¹⁰⁵ Such statements bear testimony to the attempts to find the truth and to the fact that the provincial judge was granted increased competence and authority although only a few sentencing letters bear witness to an interpretation of the law or a decision made in principle.¹⁰⁶

In spite of this independence in the conduct of the *ting* and the composition of the sentence, the determination of the case itself, the decision itself, was not made by the provincial judge in most cases, at least not before the end of the sixteenth century. In the majority of late-medieval cases the provincial judge—who in this period was only rarely called 'judge'—only appointed or nominated the jury that was to

¹⁰³ There are examples that *sandemænd* could swear oaths for several days if they were not present on the same day, see Jens Christian V. Johansen, *Da Djævelen var ude... Trolldom i det 17. århundredes Danmark* (Odense, 1991), p. 28.

¹⁰⁴ See DD 2:3:391 (1290); DD 2:10:5 (1328).

¹⁰⁵ This is remarkably similar to the sentences that survive from Church courts in the thirteenth and fourteenth centuries in England, see for example Helmholz, *The Oxford History of the Laws of England*, pp. 311–353, 565–642. Thank you to Frederik Pedersen for this comparison.

¹⁰⁶ Lerdan, *Kongen og tinget*, pp. 226–234.

decide the case¹⁰⁷ and in other cases “the provincial judge left the *ting* and took our counsel” as is the formulation in a case of outlawry that was “examined and proven” in the *landsting* of the island of Lolland in 1448.¹⁰⁸ The fact that the provincial judge “left the *ting*” refers to the physical layout of the *ting* with its four poles or benches encircling the square where the parties produced their claims or presented their proofs and where the jurors swore their oaths.¹⁰⁹

As mentioned above, written documents or letters close and patent became increasingly common in the sixteenth century and this of course also influenced the daily workings of the *landsting*, although the development did not pick up speed until the second half of the sixteenth century, mainly in connection with demands that the sentences of the provincial court judges be composed in writing in order to establish proof of such decisions.¹¹⁰ This was necessary, for example, if the right to appeal to the royal court of law was invoked. In connection with this, the thorough and comprehensive collection of law published by Christian II in 1522 decreed that if a *landsting* sentence was to be appealed, the appellant was to go to the judge within ten days “with an uncovered head, rolled-up sleeves, open hands and bearing no weapons” to request letters of appeal to the higher court.¹¹¹ As we know, this law was not valid for an extended period and documents surviving from after the Reformation make it clear that it remained practice that the sentence had to be put down in writing within six weeks so that the losing party could appeal the sentence within these six weeks. In the same way, the Reformation did not change previous practice that an appeal was not an appeal of the sentence as such but also a questioning of the ability of the sentencing authorities to evaluate the case and the proofs. As summed up by the Koldingske Recess of 1558, the inhabitants of the realm were instructed in how to proceed if the sentence of the local *ting* was not satisfactory. In this case, they could “summon the *foged* of the local *ting* together with his sentence” to the *landsting* and subsequently also “summon the sentence of

¹⁰⁷ See for example Rep. 1:3:7467 (1445); Rep. 1:3:7703 (1447); KB 1630–32, pp. 163–164 (1630); KB 1637–39, p. 467 (1638).

¹⁰⁸ Rep. 1:3:7819 (1448).

¹⁰⁹ See Rep. 2:2:2904 (1471).

¹¹⁰ Rep. 2:2:2427 and Rep. 2:2:2452 (both 1468); FFR pp. 124 (1526), and 265 (1530); KB 1588–92, pp. 551 and 667 (1591).

¹¹¹ DRL3:13, § 44 (1522).

the *landsting* and the provincial court judge” before the king, provided that the sentences were accepted in writing by both parties.¹¹²

This meant that the *landsting* and the provincial court judge, acting as second-instance courts, could force the *foged*, the juries and the *sandemænd* of the local *herredsting*, the peculiars and the towns to defend their decisions if their decisions and sentences did not correspond to contemporary law and legal practice. The officials were obliged to accept the decision of the *landsting* and compensate the plaintiff for his costs while *sandemænd* and jurors were to provide compensation for costs at the *landsting*. If their decisions and sentences were thus appealed, they were to stand forth at the *landsting* and argue that their decisions and sentences were correct and, if the provincial judge having considered the manner in which the case had proceeded found that the decisions and sentences were not correct, he could either immediately impose sanctions against the official, *sandemand* or juror or allow the successful appellant the possibility of initiating a new case at the *landsting* against the culprits or enter into an agreement outside the *ting* with these people. A settlement was thus still a very possible outcome to such a case.¹¹³ Ideally the aim was to establish the truth and make sure that justice was done, but in practice it was more important to establish consensus so that both parties could leave the *ting* reasonably satisfied.

Summary

By and large, from the beginning of the fourteenth century until well after the Reformation the Danish law of procedure was akin to the law of procedure found in the thirteenth-century provincial laws. In terms of form it mixed accusatory and inquisitorial procedure in which private summonses, the individual production of claims and proofs and fixed legal consequences were the characteristics of the former formal accusatory form and the limited time span allowed for each procedural step and the juries’ and/or judge’s power to question the parties and their witnesses and weigh the evidence in order to establish the truth were typical of the inquisitorial form.

¹¹² CCD 1:1, § 8 (1558). This was not the same as everyone understanding the system, see for example the emphasis in CCD 3:455 (1617).

¹¹³ See VLD 5, grp. 33, p. 8.

These two forms have been analysed in connection with my presentation of the institutions for the administration of justice and the law of procedure at the local courts, and my presentation of source material mentioning or dealing with the *landsting* does not in the main change the overall picture. A few observations, however, are called for.

Firstly, the person who in time became the 'provincial court judge' did not always function as sole judge in connection with sentences, not even during the seventeenth century. Surviving sources do not reveal all facets of his office and his interaction with juries, but the only thing that appears to be absolutely certain is that from the end of the sixteenth century the provincial judge was to confirm a sentence since it was he (and the court scribe) who signed sentences.

Secondly, it appears that from the second half of the sixteenth century rules governing summons to the *landsting* were simplified so that subsequently it was legal to summon an opposing party to *ting* by delivering a written summons personally, at least unless there was a special reason that called for a dispensation. It is no surprise that the provincial courts were in advance of the local courts in regard to this since they covered a larger geographical area. This also implies that until then it had been possible to orally summon a person to the *landsting*, and at the local *ting*.

Thirdly, the sixteenth century saw an increasingly sceptical attitude to the old methods of proof, and surprisingly in this connection this scepticism included proof of court actions. The proof of court actions (*tingsvidne*), according to the Law of Jylland, was one of the strongest means of proof, but as a consequence of the increased literacy that is evident in the sixteenth century the *landsting* seem to become increasingly suspicious of means of proof that were not copied into official court books.

It thus becomes clear that even at the regional *landsting* central power had few means of influencing the development of procedural law towards the learned law. Even if there had been such a wish there was clearly a certain systemic inertia that made change difficult after the fundamental and comprehensive changes that had taken place in the thirteenth century.

CHAPTER TEN

BIRKERET, TING AND LOCAL PROCEDURE

The transfer of legal authority to royal officials or private jurisdictions, which to different degrees is known in more feudal parts of Europe before the year 1000,¹ is not found in Denmark until the middle of the fifteenth century. Here they were known as *birke* (more or less comparable with the English ‘peculiars’) and were characterised by a separation from the division into *herreder* since they were peculiar or special jurisdictions with their own *ting*. These jurisdictions could consist of a borough or a defined area of land surrounding a royal manor, a fair, a market, an ecclesiastical institution or a noble estate.² They enjoyed special protection by virtue of a royal privilege that had been issued for each peculiar. Such a privilege was the king’s recognition of the fact that the peculiar was

a particular jurisdiction that enjoyed certain legal rules that differed from national laws and had its own court in which the inhabitants of the peculiar decide their business with each other and to which persons from the outside who wish to pursue the inhabitants of the peculiar must present their plea.³

The central content of the royal privilege was the right of inhabitants of the peculiar to be sued in the first instance only at their local *birketing* (‘the court of the peculiar’):⁴ a privilege that many freeholders seem to

¹ For the problems with a narrow definition of feudalism see Reynolds, *Fiefs and Vassals*.

² Peculiar law must not be confused with the so-called *Gårdsret* (‘Farm Law’) given by Eric of Pomerania and Frederick II in 1400 and 1562 respectively, see DRL 2:3 (and renewed by Christian IV c. 1460, see DRL 2:29) and CCD 1:113. Frederick II’s Farm Law was valid in “all our and the crown’s castles and manors in our kingdoms Denmark and Norway as well as in the boroughs where we or our marshall with our *hof-sinder* and people dwell and also in the manors of the nobility... where they maintain a household or where their stewards and officials congregate with their people”, see the prologue to CDD 1:113. Thus the Farm Law followed the tradition of regulating royal retainers that is known all the way back to the *lex castrensis*, see Andersen, *Rex imperator in regno suo*, pp. 50–53; this is most explicit in CCD 6:248.

³ Lerdam, *Birk, lov og ret*, p. 22; for the unique rules found in Holstein, see this, pp. 25, 42–43, 61–76.

⁴ See for example KB 1556–60, p. 8 (1556).

have used at the royal peculiars. Meanwhile the king (probably seeking to protect his income from the fines given at the ordinary *herredsting*) vigorously tried to counteract the privileges of the noble peculiars.⁵ The law of the peculiars, however, seems only to have included a few jurisdictions, which must have meant that the law of the peculiars was subsidiary to the law of the *land*, i.e. that the peculiar was where the law differed from the law of the *land*.⁶

It has previously been thought that the peculiars were a result of the attempt by various kings, prelates and nobles to transfer the rights and privileges that they enjoyed in boroughs—some of which had an identifiable individual law before they achieved their borough status—to their lands in the countryside. However, recent research has almost unanimously rejected this idea.⁷ Henrik Lerdam convincingly argues in what is so far the most thorough investigation of Danish peculiars and peculiar laws that the creation of rural peculiars was closely associated with the royal organisation of crown lands that took place in the High Middle Ages. He argues this because it was only the king who could exempt inhabitants from their duty to appear before the court and pay their fines to the ordinary court, i.e. the *herredsting*.⁸

We find evidence in both the High Middle Ages and later of royal, ecclesiastical and noble peculiars. In these peculiars the king or a prelate or a noble was the *birkepatron*, i.e. the holder of the court of the peculiar. The oldest evidence for this dates from the reign of Valdemar II in the first half of the thirteenth century. It incorporates areas centred on royal manors, from which the king appears to have exercised his local authority and raised taxes, but the court of the peculiar is

⁵ Lerdam, *Birk, lov og ret*, pp. 87–88.

⁶ Lerdam, *Birk, lov og ret*, p. 82, commenting on Christian IV's *Birkeret* ('Peculiar Law'), which is rather late in this context since it dates from 1623, see CDD 4:46, § 2. The most closely studied peculiars are in the jurisdiction of Old Copenhagen, see, Axel H. Pedersen, *Birketing i Gl. Københavns Amt 1521–1965* (Copenhagen, 1968), but there are very few surviving sources until the end of the seventeenth century.

⁷ Paulsen, "Den skånske birkeret"; Grethe Jacobsen, "Dansk købstadslovgivning i middelalderen", *Historie* 3 (1992), pp. 393–439, esp. 426; Lerdam, *Birk, lov og ret*, who also has a comprehensive bibliography of previous studies. We do have concrete examples of the movement from rural areas to town, amongst others illustrated by the fact that Åkirkeby on the island of Bornholm was granted permission to use *Skånske Birkeret* ('the Peculiar Law of Skåne') in 1346, see DD 3:2:299.

⁸ Paulsen, "Den skånske birkeret", p. 38. The following is based on Lerdam, *Birk, lov og ret*, pp. 22–76.

only mentioned in sources dating from a much later period.⁹ By far the largest number of the approx. 230 peculiars known before 1600 were or had been royal and although changing kings, particularly in the second half of the seventeenth century, streamlined the royal administration by combining (or authorising the combination of) several smaller jurisdictions and peculiars into larger units,¹⁰ the largest proportion of peculiars remained under royal control since virtually all ecclesiastical peculiars were claimed by the king as a consequence of the Reformation in 1536. This reorganisation thus meant very little for the total number of royal peculiars, but in many cases they came to extend their geographical reach. From the end of the sixteenth century some medieval peculiars that up until this time had only covered the environs of a royal manor or a single parish and its inhabitants came to include several *herreder* with hundreds of serfs.

As mentioned above, the ecclesiastical peculiars—which are often known through the grant of a royal privilege from the second half of the thirteenth century to be part of a monastic, episcopal or chapter *jus patronatus*—were mostly taken over by the king after the Reformation. A few of these ecclesiastical peculiars were sold or exchanged to noble owners who continued the peculiar court, just as was the case with some peculiars that had previously been royal. The latter phenomenon is illustrated as early as the beginning of the fourteenth century in Southern Jylland, but we need to go all the way to the fifteenth century before we see grants of new peculiars to noblemen. Their coverage is not extensive until the later part of the 1530s, but after this they expanded steadily, partly as a consequence of sale or exchange of the crown estate and partly as a consequence of peculiars being granted to royal *lensmænd* and members of the Council of the

⁹ See Henrik Lerdam, “Birkeret og birkepatroner i dansk senmiddelalder”, eds. Agnes S. Arnórsdóttir, Per Ingesman and Bjørn Poulsen, *Konge, kirke og samfund. De to øvrighedsmagter i dansk senmiddelalder* (Aarhus, 2007), pp. 271–299.

¹⁰ See for example KB 1556–60, p. 227; KB 1556–60, p. 299; KB 1556–60, p. 358; KB 1556–60, p. 456; KB 1576–79, p. 764; KB 1576–79, p. 791. It is rare to find an explanation of why peculiars were abandoned or united—which is the underlying theme of most of the sources that mention peculiars and peculiar law—but there is an example from 1578 where a *lensmand* was commanded to cease to treat Munkebo on the island of Fyn as a peculiar because only twelve landowners lived there, see KB 1576–79, p. 381. There are also examples where the dates for the hearing of cases were changed because the previous date was inconvenient for the *lensmand*, see KB 1580–83, p. 189.

Realm who, through this privatisation of royal estates, came to form a particularly exclusive part of the nobility.

The Patron of the Peculiar, the Foged, the Scribe

The decisive prerequisites for gaining a peculiar were to have a noble background and a certain amount of property. This was a rare occurrence before 1600 as the structure of landholding until then was based around many, often widely dispersed, tenant farms that paid dues to a distant manor. There was a centrally sponsored attempt through a recess issued in 1547 to change the principles behind the division of inheritance and the generally accepted principle of partible inheritance so that an estate could remain undivided, but this change was not accepted in practice until the beginning of the seventeenth century. There can be little doubt that this was the time when noble families had grown accustomed to the idea that not all sons had to necessarily receive a share of the patrimony and when the advantages in terms of taxation and daily management afforded by large estates and the changeover from serfs to untaxed day labourers who owed service to the manor became manifest.¹¹

A contributing factor to the noble interest in acquiring peculiars was also that the patron of the peculiar, as an executive of the law, in time received a share of the fines that were payable because of the sentences passed and that the peculiars afforded a greater control over subject tenants and labourers without involving other public authorities. Although the peculiars were private jurisdictions associated with a royal or a noble estate, an ecclesiastical institution or a defined geographical area, the peculiar was not based on personal authority; instead it was associated with the estate or the institution.¹² This meant that even those nobles who were granted peculiar status for their estates were not themselves the judges presiding over their subjects, but instead they established a peculiar court and left this to either *sandemænd* who they appointed, a nominated *foged* (official) or judge to decide in specific cases. From the middle of the sixteenth century it

¹¹ See Jens Villiam Jensen, "Fra fæstegodssystem til hovedgårdssystem. Det danske godssystem i senmiddelalder og renaissance", eds. Per Ingesman and Jens Villiam Jensen, *Danmark i senmiddelalderen* (Aarhus, 1994), pp. 123–142.

¹² For this and following, see Lerdam, *Birk, lov og ret*, pp. 77–78.

thus became common that the owner of the peculiar, the *birkepatron*, was instructed in his grant of privilege to nominate or appoint a *foged* who was already active in the peculiar to preside over the court.¹³ If the *foged* was party to a case or if he was ill the owner of the peculiar was to ensure that a substitute stepped in.¹⁴ He was also required to make sure that there was a court scribe present who could summarise depositions and agreements in writing against a background of the demands of Christian III's Dronningborgske Recess from 1551.¹⁵ However, the rules concerning this date from the middle of the sixteenth century, which of course is a consequence of a general development of the structure of the *ting* and an increase in the number of peculiars.

While scribes and buildings for the *birketing* did not become common until the period from the middle of the sixteenth century onwards,¹⁶ we find mentions of the *foged* (official) of the peculiar around the same time as we hear of the officials of the *herred*, that is the peculiar official becomes a common office in the peculiars at the end of the fifteenth century. On the other hand, it is not until the following century that the title of the *foged* begins to change into *birkedommer* ('peculiar judge'). We know nothing about who these *fogeder* were until the end of the sixteenth century, nor do we know how they were paid. But later sources indicate that they were paid in the same way as the *fogeder* of the *herreder*, i.e. by a share of the tithes or through tax exemptions.

According to Christian IV's *Birkeret* ('Peculiar Law' or 'Law of the *Birk*') from 1623, there was a customary division between Jylland and the rest of the kingdom with regard to the courts. While it was customary in Jylland to use *sandemænd* at the peculiar *ting*, just as was the case for the *herredsting* and the *landsting*, the rest of the kingdom appears to have used 15 or 16 men or sages (*oldinge*) who were summoned from the peculiar or the neighbouring *herred* if the peculiar was too small to provide the necessary number.¹⁷ There was no indication whether these men were appointed ad hoc or whether they shared the characteristic of the *sandemænd* or jurors from Jylland who were

¹³ See for example KB 1556–60, p. 293; KB 1556–60, p. 425; KB 1556–60, p. 435; KB 1556–60, p. 437.

¹⁴ CCD 4:563. That this did not always happen and that the official could act as judge and executive in the same case and could delay a case in which he had a personal interest is clear from CCD 4:46, §§ 4–5.

¹⁵ CCD 4:46, § 4.

¹⁶ See KB 1647, pp. 171–172.

¹⁷ CCD 4:46, § 8.

appointed for life or an extended period respectively. However, both the *sandemænd* and the sages or the 15 to 16 men could be summoned to court by the plaintiff in exactly the same cases as we see in the Law of Jylland, i.e. in cases of boundary disputes or killings, etc.¹⁸ In the same way, the peculiar was to pay the expenses incurred by these 'truth-seekers' in connection with the execution of their duties.¹⁹

We know from the peculiar of Kjærgaard that only five *sandemænd* were needed because five names are entered in the act book under the year 1592 with the information that they are to hold their office for the following year.²⁰ That these five were not always present at the *ting* simultaneously can be seen in a case where two *sandemænd* presented an oath but it was another fortnight before two of their colleagues were present to swear the same oath and give their evaluation of the same case.²¹ The oath of the final *sandemand* is not recorded in the act book.

The office of *sandemand*, sage or juror—who according to the 1558 Koldingske Recess passed and confirmed the death penalty with the peculiar *foged*²²—was presumably never a popular office for the same reasons that affected *sandemænd* and jurors at other courts. Even though the *sandemænd*, etc., who had been appointed by the patron of the peculiar were simply to undertake a duty at the local *ting*, they would have had to take time out from their other work for such duties. In addition, there was the possibility that they would become unpopular in their local environment because of their decisions, either because they fell out with their nearest neighbours if they passed sentence against one local party, or because they were subsequently summoned

¹⁸ See Koldingske Recess from 1558, see CCD 1:1, § 13, which permitted the sentencing of homicides in peculiars, see the example in KB 1637–39, p. 84 (1637), and see for example Rep. 2:5:9718 concerning boundaries. A statute from 1636 mentions the possibility that a thief who had previously been caught in the act could be executed by the peculiar court, see KB 1635–1636, p. 517/CCD 4:563, and the earlier mention of this in KB 1635–1636, p. 405. These decisions emphasise that in future the thief should be imprisoned or perform forced labour, but this should not happen before his case had been heard by the provincial court.

¹⁹ CCD 4:46, §§ 8 and 10; in boundary cases between a *herred* and either a town or a peculiar the *herred* and the town or peculiar each produced half the necessary *sandemænd* or 'old men', see *Kjærgaard Birks tingbøger*, 3 vol., ed. Gert Ravn Nørgaard (Aal, 1988–1990) [hereafter *Kjærgaard*], here vol. 1, p. 24.

²⁰ *Kjærgaard* 1, p. 13.

²¹ *Kjærgaard* 1, pp. 43, 63.

²² CCD 1:1, § 13.

by their patron if he was not satisfied with their decision.²³ The dangers that such appointees might face is illustrated by an incident in 1567 when a *lensmand's delefoged*—the assistant of the *foged*—was attacked with a knife during a court case—the peasants simply let the killer escape, which meant that the subsequent court case was transferred to the king.²⁴

Procedure at the Peculiar Courts

The fundamental procedure that was utilised at the many peculiars across the entire kingdom appears to have been based on custom and to have developed through practice, and may have been inspired by the provincial laws governing practice in the province that surrounded the peculiar. In the earliest known grant of a peculiar jurisdiction, which dates from 1320, we learn that the peculiar must decide cases in accordance with “the laws that are called *birkelev*” (‘law of the peculiar’),²⁵ in other words that the law must have been based on something separate from the provincial laws; but other sources indicate that local laws of peculiars developed through custom and practice. For this reason Christian IV’s Peculiar Law from 1623 was probably both the first compilation and a codification of older and varied customs.²⁶

Of course any historian who wishes to analyse procedure at the peculiar courts in the time before Christian IV’s Peculiar Law is presented with a problem, but in the surviving diplomatic material we do have one good illustration of procedure at one peculiar: the peculiar of Ål, which fell under the authority of the monastery of Vitskøl in Northern Jylland. When the monastery of Esrum on Sjælland was granted peculiar status in the year 1500, they wrote to their fellow brethren in Vitskøl to ask about the rules they applied in their peculiar and the answer was given in the form of a memorandum from the peculiar of Ål in which the members of that court described the procedure that

²³ Lerdam, *Birk, lov og ret*, p. 87, and UGDD 4:107.

²⁴ KB 1566–70, p. 215 (1567).

²⁵ DD 2:8:257.

²⁶ Lerdam, *Birk, lov og ret*, pp. 80–81, which is based on DRL 1:30, § 16, and the draft version of CCD 4:46 § 1 and Rep. 2:5:9151 and 9159. The prologue to CCD 4:46 mentions an earlier law by a King Valdemar, but there is no further proof for the existence of such a law, see CDD 4:46, p. 48.

they used “because of old custom” and according to “what they heard from their old parents.”²⁷

From the memorandum we learn that procedure spanned three *ting*. At the first *ting* following the transgression, the injured party was to announce the injury and, having been instructed by the peculiar *foged*, declare whom he accused. A written summons was thus not used, possibly because the peculiar was so small compared to the *herred* or the *land*. At the second *ting* *sandemænd* were charged with producing an oath concerning the case and at the third *ting* they were to announce their decision in the form of a number of pre-set formulations, which were fixed according to the nature and outcome of the case, and in front of two *stokkemænd* (apparently men joining the *ting* meeting) appointed by the peculiar *foged*. Subsequently, the two *stokkemænd* were to witness the fact that the *sandemænd* had performed their duties correctly and justly, after which a sentence was passed by he “who first ‘*i tagis*’”, which probably meant the first *stokkemænd* to be appointed. Following this, the culprit had six weeks to obey the sentence and pay his fine. If he refused he should “leave with other outlawed men.”²⁸

Thus the procedure used at peculiars such as Ål did not deviate much from that which took place at the *herreds-* and *landsting*, which in the case of Ål was based on the Law of Jylland. That this way of proceeding was seen to be a paradigm for some is clear from the fact that this memorandum was subsequently publicly recited at the *ting* in the borough of Fåborg on the island of Fyn at the behest of the abbot of Holme monastery.²⁹ But at the same time this public recital bears witness to the fact that there must have been other ways of proceeding since the abbot clearly thought that the town council of Fåborg could learn from the Ål memorandum. However, it is impossible for us to say anything concerning the procedure, which has left no trace in the written record, and this is also the case when we investigate whether proceedings varied from peculiar to peculiar. It is, however, likely that canon law procedure would have a more pronounced influence over procedure in ecclesiastical peculiars in comparison to secular ones and even though it is very likely that the Law of Jylland’s law of procedure

²⁷ Rep 2:5:9151, see Lerdam, *Birk, lov og ret*, p. 82.

²⁸ See Rep. 2:5:9151.

²⁹ See Rep. 2:5:9159.

exercised a considerable influence in peculiars in Jylland we must keep in mind that the peculiar of Ål was an ecclesiastical peculiar under the authority of Vitskøl.³⁰

It was mentioned above that those who could initiate a case at a peculiar were those inhabitants who were subject to the patron who had received the privilege. In royal peculiars the Danish king seems to have had a particularly liberal attitude to access to the court because he allowed freemen to initiate cases at their local *ting* while the king also seems to have tried to counteract a similar development in noble peculiars, probably because of the rules governing who was to receive the fines imposed by a court. In Jylland it appears to have been the case that subjects to the peculiars could summon others from outside the peculiar to the peculiar court, but this was not the case in Sjælland and Skåne where a case had to be decided in a court determined by either the origin of the defendant or the subject matter of the case.³¹ To initiate a case, the subject matter had to include a contract with a resident of the peculiar or a transgression against him. In addition there had to be certified written legal proof to the contract and if there was no written proof the case had to be initiated at the *ting* to which the defendant owed suit.³²

There can be no doubt that it was preferable to initiate a case at the local *ting*, partly because then distance would not be a great problem and partly because it would be 'your own' *sandemænd* or 'your own' peculiar *foged* who decided the case. Whether it was this possibility for abuse or whether it was the peculiar patron's ability to influence decisions, which is referred to in the preface to Christian IV's Peculiar Law, cannot be determined for certain,³³ but those who were subject to a peculiar seem to have been ready to fight for the peculiar if there were plans to get rid of it or subsume it into another.³⁴

If the conditions were right to initiate a case, the procedure according to Christian IV's Peculiar Law was probably very similar to the one outlined by the memorandum from Ål. According to later peculiar law, which in this case primarily pointed out some of the disagreements that could arise within this procedure, the plaintiff was not just to

³⁰ See Lerdam, *Birk, lov og ret*, pp. 86–87, 89–90.

³¹ Lerdam, *Birk, lov og ret*, pp. 88–89, and DD 2:5:248 and CCD 4:46, § 23.

³² CCD 4:46, §§ 11–12.

³³ This could also be the possible use of illegal procedure, see KB 1624–26, p. 28.

³⁴ Lerdam, *Birk, lov og ret*, pp. 89–92.

initiate the case within six weeks but was also charged with securing the correct summons of the defendant so that he was informed that a case against him had been initiated. The defendant was to be given eight days to respond if he was resident in the *herred* and fourteen days if he was living in another *herred* according to Christian III's Koldingske Recess of 1558.³⁵ From the act books of the peculiar of Herlufsholm it is obvious that there was a clear focus on the correct way to announce court sanctions from a summons in a new case to an imminent sentence.³⁶

We must assume that there were sanctions that effectively meant that the defendant had lost the case if he did not appear, as there were at the *herreds-* and *landsting*,³⁷ because Christian IV's Peculiar Law only mentions a few instances in which it was possible to ensure the defendant's attendance, i.e. where the law allowed the defendant to be put in jail or restrained. One instance was when the defendant did not pay up in time and was spotted in the town or the peculiar and the other was where he tried to abscond—in this case the plaintiff and probably also the peculiar *foged* had to attempt to apprehend him without force.³⁸ In return, the plaintiff in both cases had to produce immediate proof for his claim of non-fulfilment or injurious action.³⁹

With reference to further action in the case, the Peculiar Law of 1623 appears to follow customary patterns in at least three ways since the law contains rules concerning the selection and function of the *sandemænd*, but apart from that the law also focuses on ensuring that the *foged* and the scribe of the peculiar did not unnecessarily prolong the case. If there was a suspicion of this, they were accountable to the plaintiff for a forty-mark fine, and if they refused to pay they could be

³⁵ See CCD 4:46, §§ 9 and 18; see also § 5.

³⁶ See *Herlufsholms Birks Tingbog*, 2 vol., ed. Karen Marie Olsen (Copenhagen, 1954–1959—and a vol. containing a subject index, eds. Ole Fenger, Carl Rise Hansen and John Kousgård Sørensen (Copenhagen, 1979)) [hereafter *Herlufsholm*], here grp. 30 in the index.

³⁷ This occurs in a single instance in the peculiar of Herlufsholm, see *Herlufsholm* 2:1633:270.

³⁸ CCD 4:46, § 14; see also § 15 concerning the seizure of goods. Defamation was particularly prominent in the Peculiar Law of 1623 since the culprit in a case of this kind could maintain the truth of his defamatory statements by paying an annual fine. Should he not pay the fine one year he was to be punished either by corporal punishment or gaol as long as it would not affect his health or leave permanent damage, see CCD 4:46, § 22 and to a certain extent § 20.

³⁹ CCD 4:46, § 13, and the above-mentioned references.

summoned to the *landsting*. In such cases the *landsting* was to evaluate whether there were sufficient grounds to argue that they had wasted time. If the *foged* and scribe still refused to pay the fine after a sentence by the *landsting*, they were to lose their office, but apart from this the plaintiff could still sue them for not having met the conditions of the sentence.⁴⁰

With reference to the production of proof, we find all the usual kinds of proof known from the provincial laws in the act books from the peculiar of Herlufsholm: the written statements of witnesses concerning transactions at court, the inspection of damage or of the scene of the crime, different kinds of oaths and depositions. In addition there is an extensive use of act-book entries and letters and account books.⁴¹ A common procedure for giving evidence was that the witness put his hand on the law or act book or gave evidence “with raised fingers and oath that it is fully clear in God’s truth to them”, often within the four benches that are also known from the *herreds-* and *landsting*.⁴² Thus the procedure at the peculiars did not much differ from the *herreds-* and *landsting*.

Punishments were markedly more severe than the ones that were based on the provincial laws. In the peculiars it seems that fines of forty marks were applied more frequently than in the provincial laws and in the practice of the *herreds-* and *landsting* because here the fines were applied not only in cases such as malicious damage but for ‘violent crime’ in general, i.e. also against the property of others. This meant that everything from wounding through theft, illegal felling of trees and fishing was fined at forty marks. Even this did not go far enough because the peculiar was categorised as a particular area of peace. From the memorandum from Ål we learn that the culprit also had to pay forty ‘case marks’ as a fine to both the victim and the king—this is similar to the Law of Jylland’s rules about transgressions committed in particularly protected areas.⁴³ Later, from around the end of the sixteenth century, this fine was extended to the victim as well as to the patron of the peculiar and to the lord of the culprit.⁴⁴ In

⁴⁰ CCD 4:46, § 7, on *sandemænd*, and §§ 5–6 on the official and scribe of the peculiar.

⁴¹ See Herlufsholm (index), grp. 24–25, 34, 36–39.

⁴² Kjærgaard 2, p. 10; see also Herlufsholm (index), grp. 65. See Rep. 2:1:1840 for an example of the production of an oath “within four beams”.

⁴³ Lerdam, *Birk, lov og ret*, p. 85, referring to Rep. 2:5:9151 and JL III 22.

⁴⁴ See Lerdam, *Birk, lov og ret*, pp. 85–86, referring to Da Dom 3:460 and 5:671.

other words, all cases that carried a potential fine of forty marks were permitted before the peculiar court. This also means cases of manslaughter, which according to the provincial laws were mainly subject to the *landsting*⁴⁵ (but peculiar jurisdictions were not common when the provincial laws were written down, so it could be the result of a later development as seen in the *herreder*).

The sources do not give us any information about whether it was the plaintiff and later the winner of the case who had to ensure payment of the fine or whether he received help from the peculiar *foged*. However, Christian IV's Peculiar Law makes it clear that a peasant who had come from outside the peculiar had to pay his fine or provide security for it immediately after he was caught red-handed.⁴⁶ It was thus ensured that the fine would be paid before the culprit left the peculiar in which he had been summoned and sentenced. This was probably necessary in many cases to avoid the hassle of chasing the fine. In the peculiar of Herlufsholm apprehending and jailing or demanding surety for the fine was common as a preliminary means of legal compulsion—which indicates a certain 'public' involvement from the *birkepatron* in the execution of justice—but it is not possible to evaluate whether the *foged* always participated in this from the surviving case material.⁴⁷

If the culprit wished to appeal the case, Christian IV's Peculiar Law demanded that this take place within the space of six weeks otherwise the opportunity would be lost.⁴⁸ Some culprits went via the *landsting* all the way to the royal court of law and the five sentences that survive confirm the sentences that had already been passed by peculiar courts, though some of these had been changed at the *landsting*.⁴⁹ Others were appealed directly to the royal court of law, which in several instances was the second court following on from the peculiar courts, bypassing the *landsting*.⁵⁰ In spite of the very limited survival of sources this

⁴⁵ See Lerdam, *Birk, lov og ret*, p. 86.

⁴⁶ CCD 4:46, § 19.

⁴⁷ See the above-mentioned cases in Herlufsholm (index), grp. 53, compared to grp. 54–56.

⁴⁸ CCD 4:46, § 17.

⁴⁹ See *Kongens Retterting* vol. 2:2827, 4087, 4921, 6727 and 6840. In two other cases in which the court was a court of second instance the cardinal point was in one case a confirmation of a detention and in the other an acquittal of the official of the peculiar in a debt case by means of a sentence by the provincial court, see *Kongens Retterting* vol. 2:6972 and 7321.

⁵⁰ See table 10 in *Kongens Retterting* vol. 1, pp. 76–79.

does give evidence that there was a certain knowledge of law amongst at least some of the *fogeder* who served as judges at the local peculiars at this time and in several instances we also see the patron of the peculiar intervene and summon a peasant who apparently unrightfully previously summoned a *foged*, i.e. the patron protected his *foged*.⁵¹ In the same manner we find one example that shows that a court found in favour of a peculiar *foged* where he had refused to pass sentence in a case that dealt with the contradictory statements of two nobles—in this case the patron seems to have protected his *foged*.⁵²

Summary

The peculiars were functioning exceptions to the common order of instances and to the hierarchy of courts and laws. In terms of development, they followed the main tendency in institutions and procedure that we saw in connection with the *herreds*- and the *landsting*. In the main this was caused by the fact that the central power in the sixteenth and particularly the seventeenth centuries formulated general rules both for the structure of courts and for procedure in the peculiars—rules that were often valid for the *herreder* as well and which were based on known laws and legal sources. Thus the peculiar laws were homogenised in a manner that does not seem to have applied before when the administration of justice in each peculiar had been based on local customs that in turn had been based on the foundations that the medieval provincial laws had applied regionally.

⁵¹ *Kongens Retterting* vol. 2:6727.

⁵² *Kongens Retterting* vol. 2:4921.

CHAPTER ELEVEN

THE BOROUGH—CONTINUITY AND CONSEQUENCE

Urbanisation was one of the most far-reaching new social phenomena in Denmark in the High Middle Ages. With the many new towns a new kind of human interaction arose. A reasonably large population settled in comparatively close proximity. This was an entirely new way of settling and living that had not previously been seen in larger scale in the Danish kingdom, and it gave birth to new problems that differed from those regulated and solved by the agrarian emphasis of the provincial laws.

The earliest signs of town-like settlements are known as early as the sixth century, and these were often seasonal constructions near fjords and estuaries centred on trade. From the eighth century Ribe and Hedeby in Southern Jylland developed into permanent settlements for a small group of inhabitants and functioned as a kind of staple port for their hinterland in terms of exchanging goods with other equally commercialised communities. We do not know whether there was a formal border between town and hinterland, but it is clear from the first surviving Danish charter from 1085 that towns were areas of specific taxation.¹

Amongst the many early towns there was a particular group that, by virtue of their geographical position, extent or the composition of their population, gained a position as commercial centres in relation to their hinterland. These towns were the so-called *købstæder* (boroughs) that had special privileges such as a local monopoly on trade, the right to their own administration and court, exemption from certain taxes and—at least during the Middle Ages—an exemption from military duty. It was as a consequence of this that many boroughs composed or gained their own mutually inspired laws—town statutes—had them confirmed and developed their own peculiar administration of justice.

¹ See Søren Bitsch Christensen, “De danske middelalderbyers fremkomst, udvikling og udforskning—et bud på nogle hovedlinjer”, ed. Søren Bitsch Christensen, *Middelalderbyen* (Danske Bystudier 1) (Aarhus, 2004), pp. 13–61.

The most intensive period for the formation of new towns and the granting of associated privileges was relatively late in Denmark when seen in a European context (and in the rest of Scandinavia for that matter).² This was the thirteenth century, when royal power secured the right to recognise or take away borough status from towns in return for the promise of protection, peace and law. It was during the same period that many towns developed from non-commercial so-called 'centres of consumption', where the inhabitants of the town consumed what they produced themselves, to commercial market-oriented mercantile centres with their associated market squares as the centre for the primary activities of the town, which were mostly commercial trade and specialised crafts. The determining factor of whether a town was successful or not was whether it had a central location with regard to the goods that were exchanged or transferred because the guiding principle seems to have been 'the shortest possible path' for the parties exchanging or trading. Town locations thus seem to have been determined by their function in regard to their hinterland, but other factors such as networks with other towns or economic 'gateways' and internal politics also played their part in determining whether the town was well functioning and able to adapt to new conditions and demands.³

A certain feeling of community must have been present because the town population was clearly different from the rural peasantry with regard to their legal and economic privileges. Town sizes were not so large to prevent a community feeling developing among the citizens. For example, the number of inhabitants in Roskilde in the High Middle Ages is estimated to have been between 5,000 and 10,000 while sixteenth century Copenhagen, Malmø, Ribe and Aarhus probably had only around 4,000 inhabitants each. Socially, however, the situation was far from homogenous. In the High Middle Ages there was a distinction between *rådmænd* who governed, soldiers who defended and paupers, who included all those who worked and were governed, i.e. those who did not have any part in town authority. The opposition between the town patriciate and ordinary townsfolk (citizens in modern parlance) was thus acknowledged as early as the thirteenth

² See E. Pitz et al., "Stadt", LdM VII, col. 2169–2208.

³ Concerning the efforts to secure the trade privileges of guests and town networks, see Jørgensen, *Dansk Retshistorie*, pp. 440–444.

century, and although attempts were made to reduce tension between the two groups, for example through making the support of the poor a joint enterprise, the tension increased around 1300 and again in the fifteenth century as a consequence of the formal division of the inhabitants of the kingdom into estates (of which freemen of towns were one).⁴

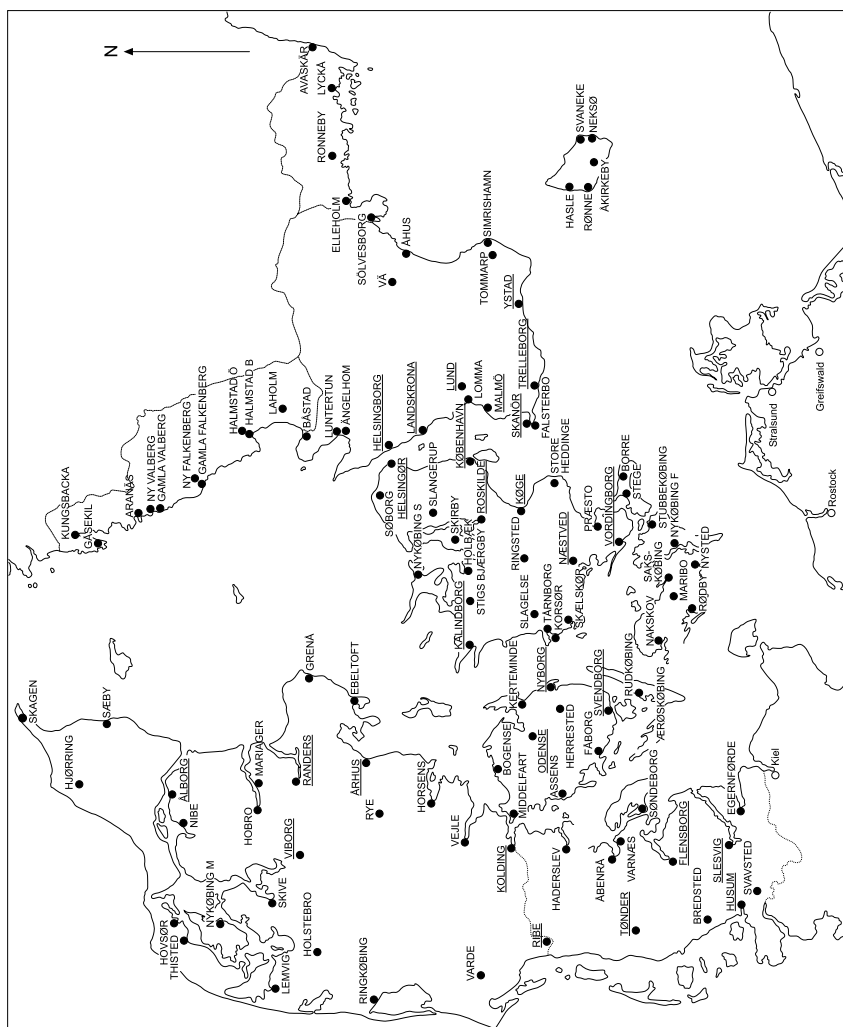
The privileges that had been granted by the central powers to a town council—which gave it the possibility of greater control over the town's economic affairs and over the internal trades-based economic and political power that was wielded by the trades guilds—was a result of royal powers' efforts to mould town taxation into a more solid framework, and by the end of the fifteenth century and the start of the sixteenth century it resulted in an increased number of explicit conflicts between town governance and administration and its inhabitants. One of the manifestations and expressions of the increasing role of both the town council and the increasingly bureaucratic administration (or magistrates) was the many town halls that increasingly appear in diocesan towns from the end of the fourteenth century and other larger and middling towns from the beginning of the fifteenth century. Until then town councils probably used a 'council room' in a guild house or such like, so the place where the town council of Skive met for a period of 70 years from the end of the sixteenth century onwards—a plot of land belonging to a citizen who was granted tax exemption for its use—must have been an exception.⁵ Town halls gave a physical space for the bureaucracy that the increased power of the magistrate necessitated and required.⁶ It was also from here that, after the Reformation of 1536, the magistrate agreed and carried out plans to reorganise ecclesiastical institutions and market squares and such like for the benefit of the commercial life of the town. It was perhaps even beneficial for a resident *landsting*, as it certainly was in the town of Viborg as showed above.

One of the phenomena that characterised a typical Danish borough in the Middle Ages was its defences, i.e. its fortifications. These had

⁴ Grethe Jacobsen, *Kvinder, køn og købstadslovgivning 1400–1600* (Copenhagen, 1995), pp. 99–101.

⁵ KB 1642–43, p. 346 (1642).

⁶ See the somewhat unusual situation in KB 1642–43, pp. 501–502 (1643), in which the king ordered the town court to move because the building, which had been constructed to house the town court, was too close to a freeman's house and was causing damage.



Map 3. Danish medieval towns.

primarily been created as a defence against external enemies, but were also a physical manifestation of the boundary between townsfolk and the peasants of the hinterland and between the self-promoting citizenry and an increasingly confident and self-aware royal power.⁷ However, during the reign of Frederick I (r. 1523–1533), and against the background of the experiences of the civil war that preceded the Reformation, a decision was made to demolish all town fortifications apart from those of Malmø and Copenhagen so that towns could no longer demand and effectively maintain a military independence from royal power. It is thus only at this time that we can see a decisive royal influence on the otherwise autonomous activities of towns. Amongst other illustrations of this we find the 1522 general Town Law, which King Christian II issued during his brief reign,⁸ but until the seventeenth century individual town councils acted very much autonomously.⁹

The Law of the Towns—The Town Laws and Practice

The point at which the towns separated from the rest of the country was the rights and privileges that each town acquired. Royally promulgated privileges, of which the earliest known (written) example dates from the reign of King Sweyn III Grathe (r. 1146–1157),¹⁰ were constantly issued for individual towns (although in the later Middle Ages there were some examples of privileges being granted for all towns in an entire province),¹¹ but from the thirteenth century more comprehensive collections of law started to appear. In contrast to the privileges and the local lords' confirmation of these, these compilations of law included wider aspects of the law and the administration of justice that applied to individual towns. Generally speaking, these town laws were quite comprehensive.

There does not seem to have been a centralised co-ordinated attempt to introduce town laws or a common town law across the country: the many laws were simply too varied for this. The foundations of these

⁷ See Søren Bitsch Christensen, "En karakteristik af den klassiske købstad og dens historiografi", ed. Søren Bitsch Christensen, *Den klassiske købstad* (Danske Bystudier 2) (Aarhus, 2005), pp. 11–46.

⁸ CCD 1:82/KB 1561–65, pp. 50–51 (1561).

⁹ Ladewig Petersen, "Reformationstiden 1536–96", p. 86.

¹⁰ DD 1:2:95 (1146–1157).

¹¹ Jørgensen, *Dansk Retshistorie*, pp. 102–103.

laws were the statutes of the town itself or of another town with added privileges and additional prescriptions issued by the king, or the lord of the town if he was not the king. Alternatively, they could be precepts agreed by the town council or translated directly from the provincial law that was valid for the town's hinterland, i.e. for the three main provinces of Jylland, Sjælland and Skåne. The models that were used depended on the location of the town: within the legal province of Jylland the Town Law of Schleswig, composed between approx. 1200 and 1243, was the model while in the province of Sjælland the model was either The Old Town Law of Roskilde dated to 1268, or The Newer Copenhagen Town Law of 1443. In the province of Skåne conditions were more complex because the only model available was the insufficient Peculiar Law of Skåne and therefore the Skåne towns attempted to agree a 'law' to provide the model for local town laws in 1328.¹²

Chronologically, the town laws before 1522—when Christian II published his general Town Law—include nine laws from the thirteenth century, eight from the fourteenth, 18 from the fifteenth and three dating from the period 1500 to 1522. In all there were thus 38 town laws, but this number includes some instances where towns were granted more than one set of laws because they needed to be updated and adapted to changing circumstances. A number of towns were of the opinion that it was easier to accept a complete set of statutes from another town than to modify an already existing local set. In all, 28 medieval towns were granted one or more town laws, which is really not that many when we factor in that there were more than 100 towns in medieval Denmark. The difference between the two numbers is interesting because it leaves us with the question of how law was regulated and administered in the lesser towns, which either only enjoyed borough status for a short period or were only towns by our definition but were never granted borough status. Some of these may have had village by-laws¹³ that they continued to use despite their altered status, but in reality in many cases we know very little about how the administration of justice took place in the many towns that either did not deserve recognised town laws or used a town law that they had adopted from one of the already known town laws.

¹² See Jacobsen, *Dansk købstadslovgivning i middelalderen*; and Jørgensen, *Dansk Retshistorie*, pp. 101–117. I owe Grethe Jacobsen thanks for allowing me consult her research notes.

¹³ See Jørgensen, *Dansk Retshistorie*, pp. 124–126.

Because of a background of a very comprehensive collection of sources consisting of 38 known town laws and more than 700 letters that established additional laws, privileges and confirmations, I have had to select certain sources to analyse in detail to give a working picture of procedural law and its development in Danish medieval boroughs. This means *firstly* that I chose to analyse three of the town laws (and their subsequent emendations) that were most comprehensively used by being copied and used by other boroughs: the Town Law of Schleswig dating from the period 1200 to 1243; The Old Roskilde Town Law of 1268; and The Newer Copenhagen Town Law of 1443. In addition to the time factor, my choice is influenced by the fact that these three town laws originate in two different provinces and reflect three developmental stages, being the first town law of the kingdom, one of the immediately subsequent town laws and the Copenhagen Town Law in which lessons had been learned from earlier legislation from 1254 and 1294.¹⁴

Secondly I will analyse the Peculiar Law of Skåne, which dates from the end of the twelfth century¹⁵ and seems to have formed a kind of model for the towns in the province of Skåne, *and* the 'law' that was probably agreed by representatives of a number of Skåne towns who intended it to be a model for local town laws in 1328.¹⁶ Thus the legal province of Skåne and the procedural issues that the lay people in Skåne saw as needing regulation, at both the end of the twelfth and the start of the fourteenth centuries, will be represented.

Thirdly, I shall make some comments on the use of physical and capital punishment made by many Danish town laws, i.e. about the severity that we find in the town laws in contrast to the laws of their hinterland. It was a common phenomenon across most of Europe that jurisdiction was more severe in towns than in the country and Denmark appears to have been no different.

Fourthly, last but not least, the legal practice that is mentioned in diplomas and other documents from the period under investigation will be analysed to uncover both the problems faced in the boroughs of the kingdom in connection with the administration of justice and the solutions to these problems that were inspired by the central

¹⁴ A survey of loans, etc. in individual town courts can be found in Jacobsen, *Dansk købstadslovgivning i middelalderen*.

¹⁵ See Paulsen, "Den skånske birkeret".

¹⁶ See Jacobsen, *Dansk købstadslovgivning i middelalderen*, pp. 425–430.

administration. These problems are of course closely associated with individual boroughs but, regardless of the nature of the problem and its solution, the circumstances, the structure of the institutions for administering justice and the consequent law of procedure are hardly so unique that it is impossible to find some general similarities. The same is the case for the great effort by the central administration to unify the legal pluralism of medieval Denmark. In this connection, I shall establish connections all the way up to the seventeenth century to show that some of the characteristics that were common to medieval procedural law and practice in other parts of Europe did not become current in Denmark until much later (if at all). Examples of this are the formal recognition of proctors as representatives of the parties and the permission, though rarely used, to employ torture as an element of procedure. Indeed, the reason why these two phenomena are treated in detail here is because we see the most detailed treatment and regulation of their role in connection with the towns.

Institutions for the Administration of Justice

In the Middle Ages, towns—particularly the larger ones that were granted or had their status as boroughs confirmed by the king—developed a number of institutions that, to a major or minor degree, influenced the administration of justice.

The Town Council and the Town Court

Previous scholarship granted a considerable role in the establishment and development of Danish towns to craft and trade guilds, not least to the masters of the guilds. These guilds were seen as forerunners of the town councils, which are first mentioned in sources dating from the end of the thirteenth century. While I do not wish to underestimate the role of guilds in the development of trade- and service-oriented towns, I must doubt that they functioned as town governance. On the one hand, it is unlikely that the town's master, that is the local bishop, a local magnate or the king,¹⁷ who owned the land in which a town originated or grew, would have accepted the guild dominance. On the other hand, the town statutes simply do not mention this role for the

¹⁷ Jacobsen, *Kvinder, køn og købstadslovgivning*, pp. 99–100.

guilds. If it had been a common way for the towns to be administered before town councils were introduced, we would have expected to find traces of these powerful guilds in those early town laws that do not mention town councils. Not even the four salaried *seniores* who are mentioned in the Town Law of Schleswig seem to have been associated in any way with trade or religious guilds. They seem rather to characterise a transitional period between the more 'democratic' activity of the *ting* along the same lines of the *herredsting* and a congregation of councillors who were recognised by the town lord, possibly as a kind of formalised record of the daily commerce of the town.¹⁸ If this is the case, the forerunner of the town councils must be found in the town councils that we know from Germany, which decided disputes over trade in which one party felt defrauded, although according to the thirteenth century Danish town laws, there were numerous ways to structure such an institution since it could be either a person nominated by the local trade guild or the town lord or a nominated council of four councillors. It seems at least from the end of the thirteenth century to have been a council that was clearly institutionalised that decided such cases. The Old Roskilde Town Law of 1268 mentions townsfolk with an association with the town hall and a council is mentioned in the same connection just five years later.¹⁹ Copenhagen's first Town Law of 1254 informs us that the town's seal was kept by two chaplains and other townsfolk, but the chaplains were replaced by the *foged* of the castle and his scribe in the second Town Law from 1294 and the townsfolk were replaced by two councillors.²⁰ In the case of Schleswig we find mention of a council that could make agreements with other towns on behalf of the town of Schleswig as early as 1280.²¹ From the middle of the fourteenth century the Skåne town councils were granted the right to appoint new members²² and after this it seems to have been the norm that the town council recruited its own members.²³ In the same manner, the town councillors were often nominated for

¹⁸ M. Mackeprang, *Dansk Købstadsstyrelse fra Valdemar Sejrs til Kristian IV* (Copenhagen, 1900), pp. 36–44. See also Jørgensen, *Dansk Retshistorie*, pp. 431–432.

¹⁹ Roskilde § 12.

²⁰ DGK III:1, § 12, p. 6; DGK III:11, § 20, p. 19.

²¹ DD 2:3:53, see Mackeprang, *Dansk Købstadsstyrelse*, p. 43.

²² See for example DD 3:6:1, § 1 (1361).

²³ Mackeprang, *Dansk Købstadsstyrelse*, pp. 42–48, 64–68; P. Munch, *Købstadsstyrelsen i Danmark fra Kristian IV's Tid til det 18. Aarhundredes Midte*, 2 vol. (Copenhagen, 1900), here vol. I, pp. 4–6.

life,²⁴ naturally with a royal letter of appointment confirming this.²⁵ The same structure is known with local variations from Germany, where it was either the town lord himself or the inhabitants of the town who chose the representatives who sat on the town council.²⁶

The rules on the acceptable social background of would-be members of town councils were formulated by King Eric of Pomerania in his statute concerning trade and borough privileges of 1422. This divided townsmen into two groups: merchants and craftsmen. It was emphasised that the mayor and the councillors could not be elected from amongst the “office holders” (the latter phrase was undoubtedly used in its medieval meaning of members of craft guilds), but that they were to be “other townsfolk and merchants.”²⁷ This was soon taken to mean that craftsmen had to give up their craft if they wished to join the town council, probably because among the tasks of the town council was the supervision of guilds.²⁸ This was the only limitation in the recruitment of town councillors until King Hans in his coronation charter of 1483 prohibited aliens, i.e. people from outside the kingdom, from being leaders or members of town councils, town scribes or town bailiffs.²⁹ The background to this was ostensibly the great influence that German town councillors, who had their own agendas, enjoyed in Swedish borough towns.³⁰ In the same legislation, the number of town councillors was limited to ten, which in the main seems to have been a successful limitation although it occasionally met with difficulties to either find or exclude competent members.³¹

²⁴ See *Helsingør stadsbog 1554–1555, 1559–1560 og 1561–1565: Rådstueprotokol og byting*, ed. Karen Hjort (Copenhagen, 1981) [hereafter Helsingør 2], p. 555; *Malmö stadsbog 1549–1559: Rådstuerettens, bytingets og toldbodrettens protokol*, ed. Einar Bager (Copenhagen, 1972) [hereafter Malmö stad], pp. 473–474; *Malmö rådstueprotokol 1503–1548*, ed. Erik Kroman (Copenhagen, 1965) [hereafter Malmö råd], pp. 337–378.

²⁵ For examples, see Mackeprang, *Dansk Købstadsstyrelse*, pp. 64–68.

²⁶ Eberhard Isenmann, “Ratsliteratur und städtische Retsordnungen des späten Mittelalters und der frühen Neuzeit”, eds. Pierre Monnet and Otto Gerhard Oexle, *Stadt und Recht im Mittelalter / La ville et le droit au Moyen Âge* (Göttingen, 2003), pp. 215–479, her pp. 217–228.

²⁷ DGK V:1, p. 107, referring to DGK III:20, pp. 73–75. See Jacobsen, *Kvinder, køn og købstadslovgivning*, p. 102.

²⁸ Mackeprang, *Dansk Købstadsstyrelse*, p. 53. See also Jørgensen, *Dansk Retshistorie*, pp. 433–434.

²⁹ DRL 2:37, § 23.

³⁰ Mackeprang, *Dansk Købstadsstyrelse*, pp. 53–54.

³¹ See examples in Mackeprang, *Dansk Købstadsstyrelse*, pp. 63–64.

The remit of the town council developed against a background of a steady limitation in the rights of townsfolk and the town lord since the Middle Ages saw the introduction of no new or different tasks in town governance. In Schleswig and the towns in Southern Jylland that developed in tandem with these limitations it meant, for example: *that* it was the council and not the town lord's ombudsman who stored disputed or unclaimed goods; *that* it was the council and not the king who collected tradesmen's dues and fines in general; and *that* it was the town council and not the ombudsman who oversaw building regulations.³² In other towns, for example Roskilde, at least before they introduced a town council, it was still up to the town lord's ombudsman and the townsfolk to agree about these matters.³³ The most detailed description of the liberties of the council are to be found in the otherwise very restrictive Copenhagen Town Laws when the council became answerable to the bishop in 1294 and to the king in 1443 because in these laws it was emphasised that the *byfoged* (town bailiff), the councillors and the mayors were to work for the benefit of the town.³⁴ This autonomous position was soon a common feature of many other East Denmark boroughs because of the popularity as a model of the Copenhagen Town Law.³⁵ The council was thus seen as the institution that protected town interests and the sources leave us with an impression that this increased over time so that the town council was increasingly seen as the 'authority' by townsfolk, just as was the case in Germany.³⁶

The severe punishment that was meted out for insults and disruptions of the council, both as a group and its individual members, bears witness to the fact that it was not without its dangers to be part of the governing body of a town. In The Newer Copenhagen Town Law of 1443 dishonouring accusations against a member of the council were liable for a forty-mark fine, which was a tripling of the comparable fine for an ordinary townsman, and if a man wounded a member of the council he was liable for the death penalty.³⁷

³² DGK I:1, §§ 32, 33, 34, 37 and 38, pp. 9–10; for other town courts in Southern Jylland, see references in Mackeprang, *Dansk Købstadsstyrelse*, p. 56, n. 2.

³³ DGK III:1, § 16, p. 169.

³⁴ DGK III:11, pp. 15–32, and DGK III:22, pp. 77–95.

³⁵ Mackeprang, *Dansk Købstadsstyrelse*, pp. 58–59.

³⁶ Isenmann, "Ratsliteratur und städtische Retsordnungen", pp. 217–228.

³⁷ DGK III:22, 5:38, p. 88.

Town government was clearly seen as being in need of improvement in Christian II's Town Law of 1522. From it we learn that the town council's court—the so-called *rådstueret*—was to be the only court and the town court (*byting*) was therefore superseded. At the same time, the nomination of the council (and the election of serving mayors) was so radically altered by the law's demand for annual rotation that the central power must have seen the now comparatively autonomous town councils as an irritation whose power should be limited at the same as the court system of the boroughs were made more effective.³⁸ However, there are numerous examples from the end of the sixteenth century that demonstrate that this did not happen. The interests of merchants, politics and administration became evermore mingled and time and time again it must have been difficult to distinguish the finances of the members of the council from the incomes that they received, for example from lands associated with their office, dues and monopolies that were often granted to the councillors as a reward for their communal but originally only honorific task.³⁹ The increased legislation and control of the autonomous town councils was not unique to Denmark because it was a common trait of German town life from the end of the fifteenth century.⁴⁰

The work of the town council mainly consisted of an administrative and a sentencing function. While the administrative part consisted of representative tasks, tax raising and supervision of town finances and the securing of law and order,⁴¹ the sentencing part of its activity found its expression in the *rådstueret* ('the town council's court').⁴²

As has been pointed out above, the council had enjoyed sentencing powers in cases of a commercial nature since it was established. Indeed these were the very reason for the existence of a 'town council'. Imitating peculiars and *herreder* there was a local *byting* that decided local legal disputes (and which probably also published transfers of land, transmitted information of significance for the town, and so on).⁴³

³⁸ DRL 3:12, §§ 1–6.

³⁹ Mackeprang, *Dansk Købstadsstyrelse*, pp. 78–89, and concerning the council's income, see the same, pp. 89–102.

⁴⁰ Isenmann, "Ratsliteratur und städtische Retsordnungen", pp. 217–228.

⁴¹ See Mackeprang, *Dansk Købstadsstyrelse*, pp. 102–113.

⁴² For the following, see Mackeprang, *Dansk Købstadsstyrelse*, pp. 113–123; Jørgensen, *Dansk Retshistorie*, pp. 435, 510–513, 516–517.

⁴³ See the many examples in the already above mentioned act books and in *Helsingør stadsbog 1549–1556: Rådstueprotokol og byting*, ed. Erik Kroman (Copenhagen,

However, as increased trade on the one hand gave rise to more financial legal disputes and on the other hand required a certain financial insight and knowledge of contract law, it became necessary to appoint a specific institution whose members held these competences. The town court, like other local courts, was supervised by a *foged* appointed by the town lord, but as the town council gained power as a consequence of socio-economic developments these experts not only displaced the common citizenry as the most important factor in the town council, but there was also the establishment of a court that, in apparent competition with the *byting*, dealt with civil suits while the *byting* (at least until the first half of the seventeenth century) apparently took care of criminal suits.⁴⁴ After this, many places began to decide serious cases at the politically more powerful *rådstueret*.⁴⁵

The division of responsibilities between the socially inclusive *byting* and the less inclusive *rådstueret* was not necessarily the usual one for after the Reformation some of the boroughs were granted the status of *landsting*⁴⁶ and in these cases the hierarchy of courts was such that cases that had been started at the town court could be appealed to the town council's court and from thence to the royal court of law. The *rådstueret* was thus in reality the court that functioned at the same level as the *landsting*, although this was not always without friction.⁴⁷ That *rådstueretter* had this competence compared to the *byting*, in which it was the *byfoged* who passed sentence, is not really surprising when we consider that it was frequently the town council who hired the *byfoged* to take care of the administration of justice, for which reason they could also claim to be the court of appeal against decisions he might make.⁴⁸

1971) [hereafter Helsingør 1], and *Stege bys bog 1418–1607: Med Oplysninger om Byens—navnlig Borgerskabets—Historie i Middelalderen*, ed. Frede Bojsen (Copenhagen, 1904) [hereafter Stege].

⁴⁴ See Johansen, "Judicial Behaviour in Early Modern Denmark", p. 94; Jacobsen, *Kvinder, køn og købstadslovgivning*, pp. 102–103. However, the official could also pass sentence outside the two normal courts, see Mackeprang, *Dansk Købstadsstyrelse*, pp. 121–122.

⁴⁵ Mackeprang, *Dansk Købstadsstyrelse*, p. 121.

⁴⁶ See for example KB 1550–55, p. 156 (1552); KB 1556–60, p. 206 (1558). There are also later examples in CCD 2:361 (1584); CCD 2:434 (1586); KB 1642–43, p. 503 (1643); KB 1649, p. 176 (1649); KB 1652, pp. 106–107 (1652).

⁴⁷ See Mackeprang, *Dansk Købstadsstyrelse*, pp. 115–117.

⁴⁸ Jørgensen, *Lokaladministrationen*, pp. 40–46.

The town council court's competence over the town court is not clear from the sources, not even when it was given the same competences as the *landsting*, and it was also a feature of the statutes and letters patent that were to be published in the court that they would be read aloud in both places.⁴⁹ The picture is particularly murky in Eastern Denmark because here the *byfoged*, in many cases, participated in the business of the *rådstueret* in the same manner as the council participated in the *byting*'s business so that the town council court and the town court might share the same personnel. The difference between West and East Denmark was that it was apparently accepted in Sjælland and Skåne that the *byfoged* could be *byfoged* and member of the council at the same time while this was more difficult in Jylland and Fyn. There are examples of such practices being prohibited in specific cases as early as the fifteenth century, but it was only much later in the seventeenth century that there was a real ban on holding both offices.⁵⁰

The Mayors

Around the middle of the fourteenth century, when town councils became self-renewing and the council members began to be appointed for life, we also see mayors appearing in the sources. The institution of mayor seems to have been internally generated, presumably from a German model, as a result of the fact that the town council, by necessity, had to have one or two spokesmen. From these origins in the fourteenth century, mayors seem to have been appointed for life, at least until the seventeenth century.⁵¹ However, in Schleswig two mayors were elected for one year at a time from a group of eight councilors (although there was a tendency for the same men to be elected for a longer period of time). From the time of Christopher III of Bavaria (1439–1448) and until the beginning of the seventeenth century, the king reserved the right to reject the chosen candidate, in other words the king appointed mayors who had been elected locally,⁵² and the number of mayors—usually two—was confirmed in statutes by

⁴⁹ Munch, *Købstadsstyrelsen i Danmark*, vol. I, p. 14.

⁵⁰ See Rep. 1:3:7631, § 16 (1446) and Rep. 2:2:3996 (1477). For the general prohibition, see KB 1635–1636, p. 517 (1636).

⁵¹ Mackeprang, *Dansk Købstadsstyrelse*, pp. 76–77. See Helsingør 2, p. 555; Malmø stad, p. 473; Malmø råd, p. 337.

⁵² Mackeprang, *Dansk Købstadsstyrelse*, pp. 48–52, 69–75 (with examples). See also Jørgensen, *Dansk Retshistorie*, pp. 432–433.

King Hans' Town Law from the second half of the fifteenth century⁵³ (although one office was occasionally left vacant in smaller towns).⁵⁴ This was also the formal reason for Frederick I's increase in the number of mayors in Copenhagen from two to four in 1526 in order to ease the workload for the two original mayors. However, this only meant that there was a stronger town government and an independent town during the civil war that initiated the Reformation, and therefore Christian III reserved the right to appoint mayors and councillors who could be faithful and useful to him after the Reformation.⁵⁵

While the members of the town council received confirmation of their office from the royal chancellery, at least from the sixteenth century, mayors appear to have received their appointment from the local *lensmand*, who had received this from the central administration. It was also the *lensmand* who was to receive the mayor's oath, in the same manner as the mayor received the oaths of the town councillors, and since the Koldingske Recess of 1558 this oath was so closely regulated that no one could excuse themselves by claiming that they had not sworn an oath.⁵⁶

The Byfoged

The development of the office of *byfoged* follows the same developmental lines that we found in connection with the *herred*, i.e. from the high medieval ombudsman (called *exactor* in the Town Law of Schleswig and *advocates* in later town laws) through the fifteenth century royal *foged* to the *foged* that from the beginning of the same century in some places began to act like the *lensmand's* long arm.⁵⁷ During the fifteenth century it became common practice that the king granted the town

⁵³ DGK V:5, pp. 72–104, § 2.

⁵⁴ See Mackeprang, *Dansk Købstadsstyrelse*, p. 63.

⁵⁵ Mackeprang, *Dansk Købstadsstyrelse*, pp. 48–52.

⁵⁶ Mackeprang, *Dansk Købstadsstyrelse*, pp. 67–68, 75–76, based on, amongst others, CCD 1:1, § 7. It is possible that such oaths concerning ethical norms, duties and tasks were required even earlier, such as is known from the German region from the middle of the fourteenth century, see Isenmann, "Ratsliteratur und städtische Retsordnungen", pp. 337–359, but we do not have any written evidence concerning this from Denmark.

⁵⁷ See Mackeprang, *Dansk Købstadsstyrelse*, pp. 204–211. That the official was not part of the town government in the same way as the council is clear from later examples in which the official received royal permission to pass sentence in cases between mayors and councils against a nobleman, see KB 1593–96, p. 409 (1595).

council permission to appoint its own *byfoged*.⁵⁸ This appointment was either for a term of years or for life, just like the royal *fogeder* or those appointed by the *lensmand*. From published court books and town court protocols from the middle of the sixteenth century it is apparent that the period of office could vary from a few years to several decades in outstanding cases.⁵⁹ The comparatively short periods of office were not only because the *byfogeder* had been appointed for a term but also because the king occasionally decommissioned a *byfoged* when he had not been royally authorised or had had an illicit adulterous affair or was demonstrably “young, inexperienced in law and useless for his office” or indeed could neither read nor write.⁶⁰ In addition, if the *byfoged* had let a defendant go free and as a consequence been jailed himself he naturally risked being dismissed.⁶¹

With the exception of the larger cities such as Copenhagen, Malmø and sometimes Helsingør where there was an *underfoged*, i.e. an assistant to the *byfoged*,⁶² there was only supposed to be one *byfoged* in each town.⁶³ This of course meant that it was necessary to find a substitute for the *byfoged* when he himself was a party to a case. This substitute could of course be the *underfoged* or a council member, but the minimum demand was that such a person should at least be unbiased.⁶⁴

Like other *fogeder*, the *byfoged* could be paid by taking a share of fines or taxes, a fixed monetary sum or, which became increasingly popular, an exemption from taxes.⁶⁵ At times their recompense could

⁵⁸ In some places it may already have been customary, as may have been the case when King Eric Menved commanded the monks of St Peter's monastery, the council and the townspeople of Næstved to observe old laws and customs concerning the confirmation and rejection of councillors and officials in 1307, see DD 2:6:100.

⁵⁹ Helsingør 1, p. 315; Helsingør 2, p. 556; Malmø stad, p. 474; Malmø råd, p. 338.

⁶⁰ For examples, see KB 1561–65, p. 26 (1561); KB 1621–23, pp. 405 and 406 (1622); KB 1571–75, pp. 118–119 (1572); KB 1603–08, p. 36 (1603).

⁶¹ Thus KB 1550–55, p. 55 (1551). Similar ethical demands of councillors are known from the German region, see Isenmann, “Ratsliteratur und städtische Retsordnungen”, pp. 364–374.

⁶² See for example Rep. 2:1:1627 (1463). And later KB 1633–34, p. 703 (1634); KB 1647, pp. 148 and 242 (1647); KB 1649, p. 412 (1649).

⁶³ See the requirement in KB 1571–75, p. 267 (1573).

⁶⁴ See for example Rep. 2:1:579 (1456); Rep. 2:1:1711 (1464).

⁶⁵ See for example KB 1556–60, p. 18 and 49 (1556); KB 1556–60, p. 70 (1557); KB 1556–60, p. 152 (1558); KB 1571–75, p. 328 (1573); KB 1571–75, pp. 487 and 553 (1574); KB 1571–75, pp. 634–635 (1575); KB 1588–92, p. 419 (1590). In 1658 the official of Roskilde was granted “freedom from taxes and hospitality like other town officials in Denmark”, see KB 1658, p. 28.

be very good since it was just a supplement to the *byfoged*'s usual income, just as was the case for the mayor and council members, and there seems to have been general satisfaction with this arrangement for this compensation continued for a long time. On the other hand, *byfogeder*, like their colleagues in the *herreder*, complained from time to time.⁶⁶ However, this was probably because their wages were never fixed but were personalised rewards that varied from town to town and *byfoged* to *byfoged*.⁶⁷

In contrast to the somewhat disparate arrangements concerning recompense, the right to appoint *byfogeder* was unequivocally transferred from the town councils to the king in the sixteenth century. In many cases the councils could nominate one or more candidates so that the king (and in reality probably also the *lensmand*, who appears to have had the final right of nomination) could appoint or confirm the person he considered to be most suited.⁶⁸ This development also meant that the relationship between the town council and the *byfoged* was not always cordial. For example, in 1457 when Christian I had to make clear that the *byfoged* and the councillors were not to fight each other or when it became necessary later on to emphasise time after time that mayors and councils had a duty to help—or at least not to work against—the *byfoged* in his work.⁶⁹

Thus a *byfoged* had to be tough. In some cases the *byfoged* had to even use his own house as a gaol (just as in the *herreder*). In many ways, the job occupied a significant part of the incumbent's time, having to attend weekly *byting*, negotiations with the rest of the magistrates and so on. In addition, the *byfoged* had to have a certain level of legal knowledge, but judging by the many letters granting appeals issued by the central administration, this knowledge was not overly comprehensive and from time to time the *byfoged* must have tried to acquire some kind of new knowledge, possibly even a new law book.⁷⁰

⁶⁶ See the somewhat late example in KB 1588–92, p. 419 (1590).

⁶⁷ Mackeprang, *Dansk Købstadsstyrelse*, pp. 211–218, 236–239.

⁶⁸ See examples in Mackeprang, *Dansk Købstadsstyrelse*, pp. 232–236; Jørgensen, *Dansk Retshistorie*, p. 437. See for example KB 1556–60, pp. 283 and 285 (1559); KB 1561–65, p. 350 (1563); KB 1561–65, p. 425 (1564); KB 1561–65, p. 684 (1565); KB 1571–75, pp. 118–119 (1572).

⁶⁹ See for example Rep. 2:1:703, § 3 (1457); Rep. 2:4:7094, 7097, 7107, 7109 and 7124 (all 1492); KB 1550–55, p. 44 (1551); CCD 1:624 (1572); KB 1584–88, p. 690 (1587).

⁷⁰ Mackeprang, *Dansk Købstadsstyrelse*, pp. 236, 239–240.

The demand for printed editions of the provincial laws, legal memoranda, etc., was clearly quite significant in the later half of the sixteenth century.⁷¹ The custom for these probably included *fogeder* and judges. Apart from their sentencing function, the royal *byfogeder* also had to secure: *that* the king's fines were collected,⁷² *that* bad debts were collected, and if necessary secured,⁷³ *that* killers were apprehended and gaoled (and subsequently sentenced),⁷⁴ and *that* public order was preserved so that the town functioned.⁷⁵ To secure that these sentencing and executive functions were executed properly, from the beginning of the sixteenth century the *byfoged* had to provide an annual account of his financial transactions, while presumably it was up to the *lensmand* or the town council to keep an eye on the rest of his exercise of duties.⁷⁶

The Town Scribe

The recess published by Christian III in 1551, which was probably modelled on Christian II's country-wide Land Law of 1522, established that courts in the future should keep an act book in which all cases and relevant information were to be preserved. This of course also applied to the boroughs. Because of this we can believe that all towns from that time on employed a scribe to execute this function at the town and *rådstueretter*. However, the recess' rule on scribes was only slowly accepted because in 1578 it was still necessary to emphasise to the *lensmænd* that they were to ensure that a proper act book was produced in the towns of their *len*.⁷⁷

⁷¹ See for example KB 1556–60, p. 257 (1559); KB 1561–65, p. 562 (1565); KB 1571–75, p. 84 (1571); KB 1588–92, pp. 446 and 463–464 (1590) and 862–863 (1592).

⁷² See for example CCD 2:628/KB 1593–96, p. 146 (1593).

⁷³ See for example DD 2:4:1 (1291); DD 3:1:255, §§ 10 and 13 (1342); DD 3:3:17 (1348); Rep. 2:1:703, § 4 (1457). It is clear that the town official already played a significant role in the Middle Ages in cases where a debtor did not meet his obligations to the creditor and came within the boundaries of the town. In these cases a case could be initiated in front of the official, who was then obliged to provide for the debtor fulfilling his obligations according to the agreement.

⁷⁴ See for example SGDL 4, pp. 237–46, § 5 (1551); CCD 1:1, § 13 (1558).

⁷⁵ See for example SGDL 4, pp. 237–46, § 19 (1551).

⁷⁶ Mackeprang, *Dansk Købstadsstyrelse*, pp. 241–242. See for example KB 1556–60, pp. 153–154 (1558).

⁷⁷ Jørgensen, *Lokaladministrationen*, p. 36; at this time scribes had also been charged with property transfers and their documentation.

However, it was not a new phenomenon to have a scribe associated with the town court or the town council court in 1551 because as early as 1292 Bishop Jens of Roskilde decided that all sentences and agreements from the town or *rådstueret* of Copenhagen were to be kept in a specific book since old disagreements sometimes re-emerged and that it therefore might be useful to have a record of these.⁷⁸ Bishop Jens' idea—which was in accordance with the legal procedure of the Church—possibly inspired many other town councils to keep similar records because, by the start of the fifteenth century, written records formed the foundation of large parts of the law of evidence in rural courts and this development is unlikely not to have been imitated in the towns, even though we cannot say for certain due to the paucity of sources. Indeed, it is most likely that the location where most transactions took place would also have been the place where literacy was most prevalent, but we have to wait until the sixteenth century before the sources reveal any information about the identity of town scribes and their responsibilities.

We have an example from Lund in 1505 showing that the person whom the *byfoged* authorised to act as his judge when he himself was a party to a case could be the scribe,⁷⁹ and from later references we can see that in both boroughs and rural areas it was the local schoolmaster or a member of the local jury who functioned as scribe—a practice that was illegal.⁸⁰ At this time there was only one scribe in each town—apart from Copenhagen, which might had several—and he worked for both the *byting* and the *rådstueret*. He was usually a less wealthy but commercially active freeman of the town and was usually appointed by the council or the mayor and was rewarded in the customary way with tax exemptions, scribe fees, etc.⁸¹

Most town scribes were active for five or six years,⁸² but a few held office for a much longer time. For instance Malmø had the same scribe for 27 years from 1577 to 1604 and he was only rarely replaced by another; this happened, for example, when he was absent on official duty, because in such cases the old scribe, who had held the office for

⁷⁸ See DD 2:1:69 (1292).

⁷⁹ Rep. 2:6:10359 (1505).

⁸⁰ CCD 1:67 (1561). See also CCD 2:321.

⁸¹ Munch, *Købstadsstyrelsen i Danmark*, vol. I, pp. 7–8, see the example in KB 1580–83, pp. 20–21 (1580).

⁸² Helsingør 2, p. 556; Malmø stad, p. 474.

almost as long, and who had become a member of the town council, took over scribal duties.⁸³

Jurors and Magistrates at the Town Court and Rådstueretter

In 1573 the central administration emphasised to mayors and council in Odense that according to “the custom in other boroughs and by the command of a recess”, i.e. the Koldingske Recess, they were to pass sentence with the *byfoged* in important cases. It took only two years before the same central administration decided to divide the town of Odense into four quarters, after which townsfolk in every quarter had to take turns to sit in judgement with the *byfoged* in lesser cases.⁸⁴

One might think that the mayors and councillors of Odense were markedly slow in comparison to their colleagues in other towns in the kingdom, but the phenomenon of slow mayors and councillors was neither new nor solved after this intervention.⁸⁵ Trying to gain an exemption or simply avoiding jury duty was clearly a frequent occurrence among borough councillors and freemen.⁸⁶ According to the rules, one could only avoid these duties: *if* one was an alien with no knowledge of Danish law and procedure; *if* the king felt that an individual was unsuited in such a way that it might call down “God’s disapproval and to prevent that an innocent man suffers an undeserved punishment”; or *if* one was a pauper or not *compos mentis*.⁸⁷

The use of jurors who were supposed to pass sentence with the *byfoged*—and who in some later cases were replaced by the town council—seems to take its origin from the old laws of procedure that we find in the provincial laws and in those areas where these were the foundation for contemporary law. Thus, while it is usual to find 15 or 16 jurors in cases of serious transgressions against the law in Eastern Denmark in the seventeenth century,⁸⁸ in those areas where the Law

⁸³ Malmø ting, pp. XI–XII.

⁸⁴ KB 1571–75, p. 355 (1573); KB 1571–75, p. 656/CCD 1:781 (1575).

⁸⁵ For example KB 1550–55, p. 44 (1551); KB 1580–83, p. 440 (1582).

⁸⁶ See for example DD 3:4:114, § 7 (1354); KB 1566–70, pp. 118–119 (1566); KB 1566–70, pp. 595–596 (1570). See also Jørgensen, “Biskop og bedste Bygdemænd”, p. 9.

⁸⁷ See for example DD 3:1:255, § 12 (1342); DKR, p. 406 (1549); KB 1584–88, p. 599 (1586).

⁸⁸ See for example KB 1644–45, pp. 48 and 100 (1644); KB 1647, p. 381 (1647). See *Malmø tingbøger 1577–83 og 1588–90*, ed. Leif Ljungberg (Copenhagen, 1968) [hereafter Malmø ting], p. IX.

of Jylland provided the legal tradition we find instead the use of *sandemænd*.⁸⁹ In this area it was probably also the principle of majority that was prevalent, just as it was outside the towns.⁹⁰

Sandemænd were not used in every borough in Jylland for, in many cases, we find boroughs using a so-called 'jury of neighbours', which was appointed on an ad hoc basis and usually consisted of twelve or eight jurors.⁹¹ In other boroughs the *sandemænd* were introduced towards the end of the thirteenth century in areas where they apparently had not been in use when the first town law was written down, for example in Schleswig. However, they often had different remits, for example many boroughs demanded unanimity for their sentences to be valid.⁹²

It was common as late as the end of the sixteenth century to find twelve or eight members of the court or magistrates (appointed for a year or ad hoc) who supervised legal transactions in the towns. However, in contrast to previous decades, they do not seem to have had a sentencing function and thus they were simply present in order to witness the negotiations and decisions that were a consequence of court activity. When central power was strengthened as a consequence of the Reformation, and even later during the absolutist monarchy, popular participation in the administration of justice, of which the jurors were a part, lost its significance.⁹³

Other Administrators of Justice

In addition to the town council, which included the mayor/s, the *byfoged*, the town scribe, and those members of the court who sat with

⁸⁹ See for example DD 2:4:1 (1291); DD 2:6:335; DD 3:1:255 (1342); Rep. 2:1:1211 (1460); Rep. 2:1:2008 (1466); Rep. 2:6:10689 (1506); KB 1561–65, p. 38 (1561). We find a particular variation of the *sandemand* institution in Randers in 1311 when eight *sandemænd* were to be recruited outside the town and their statements be supported by evidence from the townspeople before their statements gained legal credence, see Jørgensen, "Biskop og bedste Bygdemænd", p. 103.

⁹⁰ The principle of majority was already known amongst councillors in German towns as early as the thirteenth century when it was regarded as an expression of what the majority of inhabitants thought, see Isenmann, "Ratsliteratur und städtische Retsordnungen", pp. 345–347.

⁹¹ For example DD 3:6:1, § 22 (1361); Rep. 2:1:227 (1453); probably also KB 1550–55, p. 213 (1553).

⁹² Jørgensen, "Biskop og bedste Bygdemænd", pp. 115–117.

⁹³ Mackeprang, *Dansk Købstadsstyrelse*, pp. 118–120; Munch, *Købstadsstyrelsen i Danmark*, vol. I, pp. 21–22. However, see Jørgensen, "Biskop og bedste Bygdemænd", pp. 115–117, for examples of a later investigative role for *sandemænd* and jurors.

the *foged* at the town court, there were from time to time, in some towns, subordinate officials of the court (who possibly functioned as substitutes for the *byfoged* in his absence) and gaolers in the prisons, which were often located in the basements of the town halls. In addition, there were two further functions that, in a manner of speaking, were also part of the administration of justice and which developed in the Late Middle Ages into real professions, namely the positions of hangman or executioner and proctor or solicitor.

The earliest mention of an executioner is found in 1377⁹⁴ when a *spiculator* (executioner) is listed amongst Copenhagen landowners in the land register kept by the bishop of Roskilde.⁹⁵ From 1494, we find executioners in Randers and in Viborg mentioned by nobleman Mouritz Neilsen Gyldenstjerne in his account book for the Ellinggaard estate, which lists expenses for amongst other things a pair of shoes for the executioner in Randers.⁹⁶ A similar entry is found in the Næsbyhoved accounts from 1502.⁹⁷ These entries indicate that by the end of the fifteenth century it was the duty of the local lord and *lensmand* to support the local executioner, apparently without the latter necessarily having to exert himself, based on what the sources reveal.

The number of mentions of executioners appears to increase after the Reformation, especially from the end of the sixteenth century, and in the following centuries it became comparatively common that each major town had an executioner. From 1543, we find mention of one in Flensburg,⁹⁸ and in 1578 we find mentions of executioners in both Copenhagen and Kolding, who were either salaried or exempt from taxes.⁹⁹ The following year, 1579, the executioner in Copenhagen was exempted from “correcting anybody with the sword” and was subsequently granted a commission to help people with sprains and such

⁹⁴ Information about this in the later Middle Ages has been gathered by Bjørn Poulsen, to whom I would like to express my thanks for allowing me to use his material, see Poulsen, “Forholdet mellem land og by i dansk middelalder”, p. 11.

⁹⁵ *Roskildekirkens Jordebøger og Regnskaber*, ed. C.A. Christensen (Copenhagen, 1956), p. 118 (nr. 299).

⁹⁶ *Mourids Nielsen Gyldenstjernes regnskabsbog* III (private archives), p. 10 (1494), p. 33 (1494). Thank you to Bjørn Poulsen for letting me use his material.

⁹⁷ *Næsbyhoved lens regnskaber 1502–1511*, eds. Haakon Bennike Madsen and Erland Porsmose (Odense, 1991), p. 191.

⁹⁸ *Diplomatarium Flensborgense. Samling af Aktstykker til Staden Flensborgs Historie indtil Aaret 1559*, 2 vol., ed. H.C.P. Sejdellin (Copenhagen, 1865–1873), here vol. 2, p. 334 (1543).

⁹⁹ KB 1576–79, pp. 348, 418, 520 (all 1578).

like but was prohibited from bandaging fresh wounds.¹⁰⁰ Shortly after this, in 1590, the central administration issued a command to the *lensmand* and the town council that money should be found to pay for a competent executioner in Kolding since there had not previously been enough money to provide a salary for one, for which reason “an executioner must be borrowed from the nearest boroughs when a miscreant is to be executed.”¹⁰¹ This was a situation that was not unique in contemporary society.¹⁰²

The increased frequency of mentions of resident executioners in boroughs indicates that this was a function that was located mainly in larger towns and that those who represented the central administration became responsible for it. However, this did not happen until the end of the fifteenth century and became more common throughout the sixteenth century, especially after the Reformation of 1536. The spread of the office of a partially public, partially privately financed executioner who carried out capital punishment is coterminous with the increased public role in the administration of justice. A nascent specialisation and institutionalisation benefited both the central power, which appeared result-oriented and efficient, and the inhabitants, who received help to carry out the sentences of local courts (although they had to finance it).

The development of such offices took place rather late in Denmark compared to many other places in Europe. The same is the case for the formalisation and streamlining of the profession of law, which took place in most other parts of Europe at a much earlier time.¹⁰³ It was not until 1638 that the Danish central administration, apparently taking its lead from Holland,¹⁰⁴ recognised the title and function of a professional *procurator*, i.e. a person who represented another legally. In the statute that was included verbatim in Christian III’s Store Reces of 1643, it was stated that

¹⁰⁰ See KB 1576–79, pp. 694 and 701 (1579).

¹⁰¹ KB 1588–92, p. 508 (1590).

¹⁰² See KB 1588–92, pp. 666–667 (1591), concerning Varberg.

¹⁰³ James A. Brundage, *The Medieval Origins of the Legal profession. Canonists, Civilians, and Courts* (Chicago and London, 2008), pp. 164 ff. In addition also Brand, *The Origins of the English Legal Profession*.

¹⁰⁴ Palle Rosenkrantz, *Prokuratorerne i Danmark. Bidrag til den danske Prokuratorstands Historie*, 2 vol. (Copenhagen, 1927–1928), here vol. I, pp. 21–24.

for some time [there have been] proctors contrary to old and legal custom [who] pursue other people's complaints and take these upon themselves under their own power and live from it as if from a trade and nevertheless stir up many poor, mad disputes and conduct them to their own advantage in excess quarrelrousness and waste of money.

This was given as a reason for the authorisation of proctors in the boroughs by the king's *lensmænd*, mayors and councils so that they behaved as "good, pious, unblemished and true Danish men." Therefore, the demands of these proctors were: *that* they were not related to any of the parties, *that* they were to swear that they would be just and not drag out the case; *that* they did not deliver too complex opinions; *that* their office was not life-long, which meant that it could be taken away from them if they encouraged unnecessary litigation or prolonged cases; and *that* they were obliged and willing to accept cases from paupers, widows and such in return for no other pay than their sustenance since the authorities were obliged to provide legal defence for everyone. On the other hand, proctors were to receive a fee if they were given tasks to perform for the public authorities such as composing summons, but if they introduced new elements into a case in a summons (or for that matter in a legal responsum) they did so on their own accord. Finally, it was emphasised that proctors were not to be used at local courts, which instead were to use a local person where a party wished to be represented by another. Overall, a party was not obliged to use a proctor at any court but might be represented by anyone as long as that person had sworn an oath.¹⁰⁵

These rules and commentaries reflect the same concerns that provided the basis for the activity and guidelines that legal parties' representatives had to follow at the ecclesiastical courts as early as the twelfth century,¹⁰⁶ and which later found their way into secular legislation.¹⁰⁷ In addition to information about the responsibilities of a

¹⁰⁵ CCD 5:143, (2:6) § 16.

¹⁰⁶ Brundage, *The Medieval Origins of the Legal Profession*, pp. 292–370.

¹⁰⁷ See for example Fraher, "Preventing Crime in the High Middle Ages"; Francisco Alabart Ferré, "De advocatis—De figura del abogado en el Vidal Mayor", *Boletín de los Colegios de Abogados de Zaragoza* 31 (1968), pp. 25–34; Francisco Alabart Ferré, "De procuratoribus—de iudicibus. Los jueces y la Curia en Aragón según el Vidal Mayor", *Boletín de los Colegios de Abogados de Zaragoza* 32 (1969), pp. 77–92; and examples from Frederick II's Constitutions of Melfi are to be found in Konst. I 55.2, I 63, I 104.2, II 2, II 42 and II 43 concerning civil suits. In criminal suits it was necessary to appear in person, see Konst. I 97.

proctor, the statute of 1638 also tells us that before this date there had been professional lawyers, and this is substantiated by other source material in which we find mention of a nominated and paid legal representative. For example, in the summer of 1634 a party was granted permission to hire a proctor since the party was not familiar with procedural law and in 1636 a party complained to his *lensmand* because the complainant's proctor had not conducted his case properly.¹⁰⁸ It is uncertain how far back in time we can find this office, but if King Christian IV's Chancellor, the historian Arild Huitfeldt (1546–1609), can be believed, proctors were not used in Denmark at the end of the sixteenth century and this tallies well with the wording of the statute of 1638 that “for some time [there have been] proctors contrary to old and legal custom.” In other words, Huitfeldt's statement indicates an animosity towards those who used legal professionals.¹⁰⁹ One could be represented by someone else in court, but if such a person was a paid lawyer this must have been in stark contrast to the concepts of honour that the provincial laws contained or wished to emphasise because in the provincial laws such a representative appears to have been somebody who personally knew the party they represented and indicated by their acceptance of the case that they were willing to promote their case.¹¹⁰ Those who appeared for others seemed until the beginning of the seventeenth century to do so as a substitute for a party who wished to default on their duty to appear or was unable to appear or they represented paupers, women, children or others who could not represent themselves. It might be argued that there was simply no use for professional proctors in Danish law because court actions were performed orally and publicly, but against this one could argue that the orality could well mean that there was a special need for a well-spoken lawyer who could conduct the case and could influence the judge and the jury through his intimate knowledge of procedure and his rhetoric.¹¹¹ These are among the reasons why, before the statutory acknowledgement of the office of proctor in 1638, people could be granted representation by a person learned in law, possibly the *foged* or local priest.¹¹² The

¹⁰⁸ KB 1633–34, p. 687 (1634); KB 1635–36, p. 531 (1636).

¹⁰⁹ See references to this Rosenkrantz, *Prokuratorerne*, vol. I, pp. 21–22.

¹¹⁰ See for example also DD 2:5:310, § 5 (1304).

¹¹¹ See Rosenkrantz, *Prokuratorerne*, vol. I, pp. 24.

¹¹² KB 1624–26, p. 133 (1624); KB 1624–26, pp. 629–630, 663 (1626); KB 1633–34, pp. 695, 729 (1634). See also KB 1630–32, p. 483 (1631).

same may have been possible during the Middle Ages but, if that was the case, sources do not show traces of professionals. Before the end of the sixteenth century it was clearly the norm that a party to a case appeared personally once the case had been initiated.

Legal Procedures in the Boroughs—Continuities and Consequences

As mentioned above, my analysis of procedural law in Danish boroughs rests on a specified source material, namely:

1. The Peculiar Law of Skåne, which dates from the end of the twelfth century.
2. The Town Law of Schleswig, which originated in the period between 1200 and 1243.
3. The 'law' that appears to have been worked out by representatives for a number of towns in Skåne as a model for local town laws in 1328.
4. The Old Town Law of Roskilde dated 1268.
5. The Newer Copenhagen Town Law from 1443.
6. Post-Reformation recesses and letters patent from the central administration.
7. The practice that is revealed by letters, responsa and clarifications from the Middle Ages to the mid-seventeenth century.

Each of these sources represents a stage in the no-going development of legal procedures in the Danish boroughs.

The Peculiar Law of Skåne

The Peculiar Law of Skåne (*Skånske Birkeret*), which in its earliest form formed part of the law of the town of Lund, contains a number of comparatively detailed rules about how court summons were to take place and the consequences of such a summons. The first rule was that a summons could only be performed at the *byting* and nowhere else, neither at the provincial court nor before the king.¹¹³ This is the very essence of peculiar law and therefore the rule itself is not surprising, but in contrast to ordinary law, which permitted a private individual

¹¹³ DGK IV:1, § 35, p. 9.

to take the law into his own hands, the Peculiar Law of Skåne emphasised that the only right way to settle a legal dispute was to initiate a case at the town court, even in cases where a thief had been caught red-handed.

In such cases a plaintiff could choose to either restrain the thief himself or to hand him over to the official, who represented the king in the town. The condition that had to be met in order for a culprit to be bound and tied—which was seen as an action that brought disgrace upon him—was twice the value demanded by the Law of Skåne and, in a similar vein, the culprit's imprisonment in a public gaol was to be paid for by public funds while private gaoling of the culprit was to be paid for by the plaintiff. If an plaintiff chose to detain the thief and subsequently allowed him to escape, possibly as a result of a private agreement, the plaintiff had to produce the proof of an oath of 36 men who were to swear that he had not done so deliberately or he was to pay forty marks to the king and another forty marks to the town. The town, on the other hand, collectively paid a fine of nine marks to the king if its court did not decide the case but allowed the thief go free. However, when the case had been joined, the proof demanded to convict the thief was two witnesses of his transgression, following which the members of the court could punish him as they wished.¹¹⁴ In this connection it is interesting that the two witnesses were a *Beweisurteil*, which could neither be counter-proved by compurgators nor appealed.¹¹⁵ Subsequently, punishment was physical, for example a whipping. The rules thus, on the one hand, gave good reasons for handing over the captured thief to the representative of the king and, on the other, motivated the court to not let him go if the victim was able to produce the two necessary witnesses.

For the man who was not caught red-handed but who was accused of theft, the likelihood of an acquittal was better because in such cases the defendant could defend himself with an oath of 36 men. If this failed, or if the stolen goods were found in his home, he was to compensate the plaintiff with a payment of nine marks and agree fines with the king up to the size of his *hovedlod*. On the other hand, fencing

¹¹⁴ DGK IV:1, §§ 10–15, pp. 5–6; see Paulsen, “Den skånske Birkeret”, pp. 31–33.

¹¹⁵ DGK IV:1, § 10, p. 5; see Paulsen, “Den skånske Birkeret”, p. 32. On the other hand it was possible for the person accused of sheltering a thief to defend himself by an oath of 12 freemen, see DGK IV:1, §§ 16–17, p. 6, and Paulsen, “Den skånske Birkeret”, pp. 32–33.

stolen goods, which in other contexts was comparable with theft, was only punished by a fine of three marks and the compurgation of twelve men.¹¹⁶

With regard to the general rules for summoning, the first was that a summons could not be made outside the town court. Secondly, if the defendant ignored a summons he was liable for a fine of two *øre* in the first instance rising to nine marks to the plaintiff and three marks to the king following the fifth summons. Thereafter, the plaintiff could have the defendant declared a *retsnægter* ('law-denier'), the consequence of which was outlawry.¹¹⁷ The number of times it was possible to ignore a summons corresponds well with the earliest provincial laws and Eastern Danish law in general, which made it possible to ignore four summons. However, in this case, the defendant was given a little extra time by the king (which was countered by the fact that the towns granted the king's official the right to initiate cases).¹¹⁸ In the same way, the law increased the demands for a successful defence against accusations of both theft and servitude. Such an accusation would cost the accuser three marks unless he could forswear it with an oath of twelve—which was the demand if it happened outside the *ting*—or an oath of all the members of the court if the accusation was made at a meeting of the *ting*.¹¹⁹

When the parties appeared before the court the case was to be presented. This probably happened by the plaintiff repeating his claim, which had previously been produced in connection with the summons or publication of the case. After this, the defendant entered a plea of either guilty or not guilty. Subsequently the case was to be decided, and in this connection it is interesting to note that the Peculiar Law of Lund rejected the use of jurors but preserved the rule that this had to be done by compurgators. Kirsten Berth Paulsen has pointed out that this rule bears witness to a contemporary discussion about whether jurors were to replace compurgators and therefore she argues that these rules were contemporary with the Church Law of Skåne but predate the Ordinance on Manslaughter of 1200, i.e. she dates the Peculiar Law of Skåne to the end of the twelfth century. However, the

¹¹⁶ DGK IV:1, §§ 18–20 and 23, pp. 6–7; see Paulsen, "Den skånske Birkeret", p. 34.

¹¹⁷ DGK IV:1, § 37, pp. 9–10.

¹¹⁸ DGK IV:1, §§ 38–39, p. 10; see Paulsen, "Den skånske Birkeret", pp. 38–39.

¹¹⁹ DGK IV:1, §§ 21–22, p. 7.

existence of this rule also shows that there was a deep-seated suspicion of the—in Danish context—new element of the law of procedure, for which reason the king found it necessary to give the town a privilege, granting it the right to maintain an older system of proof.¹²⁰

The sections of the Peculiar Law of Skåne dealing with sanctions contain a number of elements that we have seen in earlier laws, namely fixed and settled fines proportionate to the damage caused by the culprit (excepting those cases in which revenge killing was allowed, for example if a man found another man in bed with his wife because in such cases it was allowable to kill the man without further sanctions).¹²¹

Overall, the law of procedure in the Peculiar Law of Skåne was similar to what we find in the earliest provincial laws, with some adjustments. There was more leeway with regard to ignoring a summons, but the most important fact is that the Peculiar Law of Skåne consciously and explicitly rejected the use of juries and maintained the older tradition of compurgation.

The Town Law of Schleswig

The Town Law of Schleswig emphasised even more strongly that townsfolk could only be summoned to appear before the *byting*. In the very first chapter we learn that not even in connection with crimes against the king could a townsman be summoned to any other court.¹²² Like the Peculiar Law of Skåne, a significant part of the Schleswig Law dealt with theft and how to deal with the thief. However, in contrast to the Peculiar Law, which demanded that the thief be produced before the court to receive a sentence, the Town Law of Schleswig required only that a thief who had been caught in the act be presented at the town court on his way to being hung at the designated place for executions.¹²³ This accords well with the provincial laws, which also promoted clear consequences. If a captured thief was either released or not hung, or taken outside the town so that he was not correctly prosecuted, the Town Law stipulated the same large fine that we found in the Skåne

¹²⁰ DGK IV:1, § 36, p. 9; see Paulsen, “Den skånske Birkeret”, p. 38.

¹²¹ DGK IV:1, §§ 40–54, pp. 10–14; see Paulsen, “Den skånske Birkeret”, pp. 39–44.

¹²² DGK I:1, § 1, p. 3. See also rules in § 90, p. 17, in cases where the defendant had not committed his transgression in town but in the countryside and was not a member of the *syssel*.

¹²³ DGK I:1, §§ 14, 17 and 25, pp. 6 and 8.

rules of forty marks to the king unless it was possible to prove to the king by an oath of twelve men that this had not happened.¹²⁴

This was the procedure if the thief was caught in the act, but if a theft had taken place and the victim had not caught the thief, he was to summon the person he suspected of the theft to a subsequent court meeting. In such a case, the suspect was not to be bound, which did happen to the thief who had been caught red-handed, because the defendant had to be given the possibility to appear voluntarily to defend himself at the court session immediately following the summons.¹²⁵ He could then either confess and replace what was stolen or he could deny the theft and provide the usual defensive proof, which according to the Town Law was an oath of twelve men.¹²⁶ The choice between confessing and replacing or providing defensive proof through an oath of twelve did not just apply in connection with theft: if the plaintiff did not have two witnesses to a rape or sexual transgressions, the defendant could prove his innocence with the same oath of twelve men.¹²⁷

The Town Law of Schleswig has a further couple of rules concerning theft that appear to have had the purpose of encouraging the victim to raise the case in the right way, i.e. by publishing it or summoning the suspect to the *byting*. Firstly, if the suspect was accused of being a thief during court proceedings, he could clear himself with an oath of only five neighbours, or six other people if he could not find enough neighbours. However, if a friend of the victim stood accused of theft, there was a heavier burden of proof in that the friend had to produce the oaths of twelve men. Secondly, he could defend himself with five others if the victim had taken back the stolen object from the suspect's house in response to the witness of two men and the oaths of twelve.¹²⁸

¹²⁴ DGK I:1, §§ 14 and 25, pp. 6 and 8.

¹²⁵ This is in contrast to cases of wounding where a case could be initiated after the wounds had been displayed at two preceding court sessions, see DGK I:1, § 3, p. 4.

¹²⁶ DGK I:1, §§ 23, 24, 26 and 27, pp. 7–8.

¹²⁷ DGK I:1, §§ 2, 4 and 5, pp. 3–4. In one case family could choose to avenge fornication, see DGK I:1, § 11, p. 5, which seems to be a remnant of an older idea of women as 'social capital' that needed to be protected by the family. However, in § 20, p. 7, it was specified that only a husband could accuse his wife of adultery. Cases of rape were not to be conducted before the town court but instead before the highest guild, see DGK I:1, §§ 2 and 4, pp. 3–4, which may indicate that these rules originated in a period when guilds had a general legal role in addition to their power over their own members.

¹²⁸ DGK I:1, §§ 15, 16 and 18, p. 6.

If the plaintiff thus tried to recover the disputed object before sentence had been passed, he faced tougher demands for evidence of his ownership and the defendant could defend himself with half the number of compurgators. The same was the case if a victim made unsubstantiated accusations concerning theft to the court. The point of these kinds of rules was probably to limit unsanctioned action outside the court and to ensure that a case was initiated in the correct manner so that the defendant was allowed time to construct a proper but still demanding defence.

The Town Law of Schleswig did not contain clear rules concerning what was to happen in cases of non-appearance of the defendant, apart from the case where he had been summoned by the king for tax evasion. In that case, the defendant was to pay a compensation of three marks for each of the *ting* meetings that he did not attend. This could happen three times before he was to be considered guilty unless he produced an oath of twelve men that he had appeared in court.¹²⁹ It is doubtful that we can transfer these rules to transgressions other than this specific one since such a possibility is not mentioned and the automatic conviction implies a certain force behind it—a force that was most likely only wielded by the king.¹³⁰

Many of the rules in the Town Law of Schleswig are similar to rules in the Peculiar Law of Skåne, but the town law of Southern Jylland deviates in two respects: Firstly, it was a common rule that at least five days had to relapse between oaths of twelve if the defendant was to produce a multiple of these. Secondly, the consequences of perjury were summarised by the law and meant that the perjurer would lose his honour and therefore could not judge others, be a witness in court or be a compurgator.¹³¹ The rules testify to a critical approach to compurgation in so far as it was not automatically applied since the defendant's compurgators had to appear at several meetings of the court to support the defendant if he was defending several cases and since it acknowledged that the plaintiff, the defendant, the witnesses and the compurgators might not be acting in accordance with the truth. This

¹²⁹ DGK I:1, § 29, p. 8.

¹³⁰ Thus it was possible to gain the town official's assistance in obtaining monetary compensation for theft, see DGK I:1, § 24, p. 7. See also DGK I:1, §§ 3, 21, 28 and 88, pp. 4, 7–8. and 17, concerning the king's right to fines and the official's active participation in the performance of law.

¹³¹ DGK I:1, §§ 48 and 89, pp. 11 and 17.

in itself was an insight that started to dawn at the beginning of the thirteenth century.

The Old Town Law of Roskilde

It was in the nature of the town laws that they mainly dealt with matters covering commercial activity. This is a trait that we find again in the royal supplementary laws passed during the fourteenth and fifteenth centuries. However, some of these also contained rules that were relevant for the administration of justice. Among other things, it became common during the fifteenth century that the inhabitants of boroughs could not be called to sit on a jury or be summoned to appear as defendants before courts outside their borough.¹³² As we saw in the cases of the Peculiar Law of Skåne and the Town Law of Schleswig, such a privilege was not a new thing and it is also found in The Old Town Law of Roskilde of 1268, which also stipulates that the court had to be held in the square outside the town hall.¹³³

Apart from this nugget of information, we learn very little about the procedure used in Roskilde. The older part of the Town Law, which ends with chapter 17,¹³⁴ contains no information about how a case was initiated, but there is little reason to think that this did not happen in the same way as in other contemporary town laws. There is certainly a great similarity between the punishments that these town laws meted out for the same transgressions, particularly for the more serious ones. The usual punishment for killing, rape, malicious damage and wounding was to be forty marks, according to the provincial laws, and we found the same amount in Roskilde. According to the Old Town Law of Roskilde, a culprit who was caught in the act had to compensate both the king and the town in cases of killing, damage and wounding. In the two latter cases, there was also a compensation to be paid to the victim while the share that normally went to the family in connection with killing was to go to the town. There was more consistency

¹³² Jacobsen, *Dansk købstadslovgivning*, pp. 408–15. See for example DD 2:1:83 (1292); DD 2:5:174 (1302); DD 2:7:7 (1313); DD 2:8:263 (1320); DD 3:3:17 (1348); DD 3:4:67, §§ 4, 5 and 9 (1353); DD 3:6:1, § 5 (1361); Rep. 1:3:6262; § 2 (1426); Rep. 2:1:324 (1454). Also DD 2:5:34 (1299) and DD 2:8:344 (1321), which deal with out-of-town advocates, would seem to indicate this, but DRL 2:30, § 13 (1466) points to the opposite conclusion.

¹³³ DGK III:1, § 12, p. 168.

¹³⁴ See DGK III:1, § 17, p. 170, and the prologue to the town law, p. 165.

in the punishment meted out to those who raped women inside the town walls because if the culprit was caught red-handed he was to be punished by execution.¹³⁵ In connection with the payment of fines, the sequence seems to have been that the plaintiff was to receive his part first, then the town and finally the king, who was represented in this case by his *foged*.¹³⁶

It is interesting to see the social differentiation in the difficulty of proof demanded. A defendant had to prove that he was of good name and reputation if he was not caught actually committing a crime but was instead summoned to appear before the court. If the defendant was an ordinary citizen, he was to defend himself with an oath of twelve, while members of the Guild of St Canute—the merchants' guild—only needed to produce an oath by twelve hands, i.e. six people.¹³⁷ These rules for proof show clearly that in the middle of the thirteenth century there was a concrete social stratification that manifested itself in the administration of the law. The old dividing line between men who had their 'peace' and were therefore legal subjects and men who could not guarantee the payment of a fine, which was to be imposed in case a proof failed, also existed in Roskilde. If the *byfoged* demanded a surety or a guarantee from somebody who had been summoned for a three- or a forty-mark transgression, the defendant's land could be used as this surety if it was of a value of at least three marks.¹³⁸

The Town Law of Skåne in the Late Middle Ages

The first two-thirds of *Skånske Ret*—the Town Law of Skåne—were probably composed in 1328 and functioned more or less as 'a catalogue of ideas' for updating the Peculiar Law of Skåne and was agreed at a meeting between representatives for the towns of Skåne. Thus the 1328 rules must be interpreted as a supplement to the Peculiar Law. The earlier rules were formulated during the uncertain conditions during and after the reign of Christopher II (r. 1320–1326 and 1330–1332)

¹³⁵ DGK III:1, §§ 1, 2, 3 and 4, pp. 165–167. According to a later edition, in cases of lesser wounds the victim was to receive slightly more than the king and the town, see § 23, p. 171.

¹³⁶ See DGK III:1, § 14, p. 169.

¹³⁷ DGK III:1, §§ 1, 2, 3 and 4, pp. 165–167. In 1360 a member of the guild of St Knut in Malmø was valued significantly more since 36 compurgators could be replaced by six guild-members, see DD 3:5:395, § 23.

¹³⁸ DGK III:1, § 4, pp. 166–167.

while the later rules, which in contrast have some rules concerning procedure, are typical of the fifteenth century and probably date from that period.¹³⁹

The facts that there are no new procedural rules among the statutes that were elaborated in 1328 and that we have to go as far ahead as well into the fifteenth century before new attempts were made to improve or renovate the administration of justice and put in place new rules for the boroughs,¹⁴⁰ were probably caused by two factors. *Firstly*, it was, at least compared to the fifteenth century, not that long ago that the provincial laws had been elaborated and written down. Therefore, a revision of the fundamental administration of justice and its institutions was not necessary. *Secondly*, many towns had not yet received their first town law from the central power (unless of course there were many town laws that have now disappeared without a trace). This did not mean that there were no institutions that dealt with the administration of justice, i.e. the legal systems and legal administration functioned in individual boroughs despite the lack of written normative guidelines, but rather it meant that it was necessary in such cases to take down and agree these guidelines before they were changed. *Thirdly*, the development of legal administration was more or less on stand-by in the fourteenth century when varying kings, magnates and other political actors—into which category the towns also fall—had more than enough to cope with, primarily because of the unstable politics of the time and later in connection with the unification and reconstitution of the Danish nation and the Danish kingdom during the reign of Valdemar IV. In a nutshell, there was much to distract attention away from a reform of the legal system.

So it was apparently only in the sixteenth century that the administration of justice received renewed attention, and in this connection it is surprising to find that the boroughs of Skåne protected their jurisdiction in cases such as murder and homicide and that the question of whether such deaths were accidental or intentional was still to be decided by the proof of twelve compurgators (although these were to be chosen by the *byfoged* and the councillors and not by the defendant as done earlier).¹⁴¹ By this time, following the Law of Skåne, the

¹³⁹ Jacobsen, *Dansk købstadslovgivning*, pp. 427–430.

¹⁴⁰ Jacobsen, *Dansk købstadslovgivning*, p. 408.

¹⁴¹ DGK V:1, §§ 30, 35 and 36, pp. 338–339.

province of Skåne had long since allowed such decisions be made by juries consisting of 15 or 16 jurors, but this was clearly resisted by the boroughs. On the other hand, a killer who was caught in the act was to be executed by *stejling* (or burning or stoning if a woman). *Stejling* was where the convicted man had his bones broken or was executed and then his body was exposed on a wheel. In addition, the killer's *hovedlod* was to be distributed between the plaintiff, the king and the town,¹⁴² which is very similar to the rules that we found in the Old Town Law of Roskilde of 1268. Similar rules and punishments are also found in connection with new rules concerning slander.¹⁴³

The Newer (third) Town Law of Copenhagen

In contrast to the Town Law of Skåne, where the last third appears to date from the fifteenth century, we know the year of composition for the Newer Town Law of Copenhagen, which was granted by King Christopher III of Bavaria in the autumn of 1443. This town law follows the tradition of the proceeding town laws, but by 1443 it had become so comprehensive that it was divided into a number of chapters with subordinate clauses. Most rules dealt with economic matters, this time in connection with debt, the tapping of wine and the internal order of the town, but a number of rules dealt with the administration of justice and matters of procedure.

Thus we find, for the first time amongst the town laws that I have investigated a detailed description of how a summons to the *byting* should take place. Making the statement first that cases that were initiated in Copenhagen must also be decided in Copenhagen,¹⁴⁴ the law went on to state that the person who was summoned to the town court had to be summoned by two of the *svende* of the town (who must be the equivalent of summoners) at his residence where his neighbours had to witness that the summons had been correctly delivered. The procedure was the same as the one that we found in Eric's Law for Sjælland and, like this law, the defendant was subject to increasingly severe sanctions for every court meeting that he ignored—if he ignored the

¹⁴² DGK V:1, §§ 30 and 35, pp. 338–339.

¹⁴³ DGK V:1, §§ 40, 41 and 42, pp. 339–340. The punishment could also be capital, see for example Rep. 2:6:10756 from 1507, when two outlawed peasants were dragged to Lund to be “exposed to the sword here today in court.”

¹⁴⁴ DGK V:1, 5:24, p. 86.

fourth summons it would cost him forty marks, to be divided between the king and the town, and thereafter he and his *hovedlod* were to become subject to the king and the town should he not appear.¹⁴⁵

Among the more general procedural rules we also find an emphasis on the fact that a case that was decided by the *byfoged*, the mayors and the town council in accordance with the town law must stand. However, it transpires that it was not set in stone: if a person objected, he would lose his *hovedlod* if the councillors once again passed a sentence against him.¹⁴⁶ It is perhaps therefore not so strange that the *byfoged*, the mayors and the councillors were attacked both verbally and physically. For this reason they were protected by the law's threat to impose three times forty marks fines, to be given to the injured party, the king and the town in cases of verbal attacks or beatings, and in severe cases where there was wounding the perpetrator was to be executed.¹⁴⁷ We also meet such threats later¹⁴⁸ and the composition of the group of those who were to receive compensation is also known from earlier town laws.¹⁴⁹

If the plaintiff was not satisfied with the decision of the court, and instead threatened and defamed the culprit, the plaintiff had to provide surety to guarantee that he would not hurt the other. In other words, he had already provided a fine if he acted in such a manner that it became a transgression. If he refused to provide this surety, he was to be imprisoned until he stopped his threats or provided the necessary money for a fine.¹⁵⁰ In the same way, the name of a person who had run away from his commitment to pay a fine was to be entered into the town records, and if he was subsequently caught "he shall be subject to pain according to whether his transgression is large or small."¹⁵¹ Thus it was not enough that he paid a supplementary fine

¹⁴⁵ It is impossible to determine whether it was the town or the plaintiff who paid two freemen to witness the summons, but in 1651 the mayors and the council in Copenhagen were told by royal command to pay a citizen for his summoners if he decided to conduct a case before the court, see KB 1651, pp. 122, 127 (1651). This situation, however, seems to be unique and this may be the reason for the 'free process' granted in this case. However, compare also KB 1627–29, p. 122 (1627).

¹⁴⁶ DGK V:1, 5:22, p. 86.

¹⁴⁷ DGK V:1, 5:38, p. 88.

¹⁴⁸ See for example KB 1609–15, pp. 368–369 (1611).

¹⁴⁹ DGK V:1, 6:2, p. 91.

¹⁵⁰ DGK V:1, 6:4, p. 91.

¹⁵¹ "Han pines efter thy, som hans brødhe ær stor eller liden til", see DGK V:1, 6:5, pp. 91–92. See also paragraph 6:10, p. 92.

in expiation of his non-compliance, but he also had to be subjected to pain and physical punishment for his transgression in contrast to the otherwise fixed and limited punishments that were meted out in proportion to the violence of a particular crime.¹⁵² We are thus speaking of relatively severe punishments, usually physical, and have thus moved far from the fine-centred penal law that was characteristic of the provincial codes of the high Middle Ages.

Post-Reformation Practice

There are many lacunae in our knowledge of how medieval boroughs exercised their jurisdiction. However, the post-Reformation material, which is rich in comparison to the medieval survivals, can help throw light on the subject. First and foremost, it is clear that mayors, councilors and *byfogeder* were not much better than their rural counterparts in terms of the speed with which decisions were reached, the percentage of cases decided¹⁵³ and the speed with which the courts produced documentation.¹⁵⁴

In the same way, we must conclude that there were no marked differences between the administration of justice found before and after the Reformation. It was still the case: *that* in many cases—and therefore also in towns—the judge attempted to establish arbitration in order to reach a proper solution (whatever such a thing may have been given the lack of schooling, professionalism and knowledge of legal precedent);¹⁵⁵ *that* arrests could be made privately (as late as the seventeenth century all that was required was a prior permit);¹⁵⁶ and that the gaoled party was required to pay for his own sustenance during his imprisonment (if there was money available).¹⁵⁷

We find an illustrative example of this tendency in a letter patent dating from 1573 by which the procedure for recovering bad debts known from the Law of Jylland is introduced across the island of Fyn

¹⁵² See DGK V:1, 6:7–28, pp. 92–95.

¹⁵³ See for example KB 1588–92, p. 547 (1591); KB 1593–96, pp. 178–179 (1593); KB 1593–96, pp. 253 and 364–365 (1594); KB 1593–96, pp. 672–673 (1596).

¹⁵⁴ See for example KB 1566–70, p. 39 (1566); KB 1571–75, pp. 124–125 (1572).

¹⁵⁵ See for example KB 1637–39, pp. 537–538 (1638); KB 1649, p. 65 (1649).

¹⁵⁶ Thus KB 1627–29, p. 757 (1629).

¹⁵⁷ See for example Miss. 2:250 (1511) and KB 1556–60, p. 288 (1559). See also DD 3:6:1, § 9 (1361).

exactly as it was applied in the towns of Northern Jylland at the behest of borough citizens from Fyn. After this, the whole procedure is listed so that there is no doubt what the procedure should be, i.e. *firstly* that the borough citizen raises or publishes the case at the byting; *secondly* that he and two witnesses produce a summons to the opposing party by going to his place of residence and giving him a summons; and *thirdly*, that the case, if necessary, is to be pursued at three *ting* meetings, after which the summoners and the plaintiff, with raised fingers, are to swear that they summoned the defendant. If the defendant, who can send a proxy to represent him, refuses to appear before the *ting*, the *byfoged* is to appoint six 'hearers' who are to hear the defendant speak about the main part of the debt, and if the defendant still refuses to defend himself they are to pass sentence against him.¹⁵⁸

The background to this request and the grant of the right to apply the procedure of the Law of Jylland in debt cases was that previous procedure had in-built problems that it was hoped to eradicate. Firstly, there was doubt about what constituted the right court because non-town dwellers refused to appear before court in towns and transferred proceedings to their local court. In these courts the demand was that the plaintiff had to appear at three consecutive meetings of the court with two new men accompanying him each time so that in the end he had to appear with six helpers *just to be granted permission to conduct the case*. Secondly, it was of concern to avoid the situation where the plaintiff paid one or more of these six men—who did not appear in consecutive courts and therefore were probably quite satisfied with being paid once for their appearance—and they then did not turn up at the fourth meeting of the court and the right to pursue the case was thus not granted to the plaintiff.¹⁵⁹ It was still up to the individual to act and react and it was only in particularly blatant cases that the central administration took the initiative, or found itself able, to regulate practical procedure.

We see this in connection with the introduction of judicial torture, which was only formally introduced in Denmark in Christian I's two collections of law for towns (the Town Law) and the countryside (the Land Law) of 1522. These permitted judicial torture when there was strong circumstantial evidence concerning either theft or witchcraft

¹⁵⁸ CCD 1:655 (1573).

¹⁵⁹ CCD 1:655 (1573).

but where the authorities wished to confirm these by forcing a confession from the accused.¹⁶⁰ The perceived danger of witchcraft was probably the reason why it involved such serious investigative techniques while theft was the most common crime and therefore also the kind of crime most in need of reduction.¹⁶¹

It is very likely that Christian II and his administration were inspired in this matter, as well as in many other reforms, by practice and legislation in the Low Countries and Germany. Even though Christian II's legislation was rescinded after he was deposed, the new possibility of using torture as part of procedure did not disappear because it joined post-Reformation legislation in the Copenhagen Recess of 1547 and the Koldingske Recess of 1558 in those cases—and only in those cases—in which the accused had been sentenced to death before having confessed to his crime. The surviving examples we have of this are very few and all date from the period after 1558, in other words, torture was never a common procedural step in Denmark.¹⁶² However, to the extent that it was used, there is no doubt that it was initiated by the central power, and a significant factor behind this is the fact there was not a sufficiently professional bureaucracy that could carry it out, just like the situation in England and Sweden. Another possible explanation may be that Denmark was not plagued by internal religious or political disturbances to a significant degree after the Reformation, i.e. there was a certain amount of internal stability that did not foster the development of new extraordinary jurisdictional developments.¹⁶³

There is, however, a certain significance in the fact that torture was permitted at the beginning of the sixteenth century. There was a particularly harsh penal law that from its beginning characterised the exercise of jurisdiction in towns, which became even more pronounced as the Reformation approached.¹⁶⁴ We find examples of this in the vari-

¹⁶⁰ See DRL 3:12, § 44, p. 65, and DRL 3:13, §§ 72, 77 and 78, pp. 178, 180–181.

¹⁶¹ Peter Schuster, “Die mittelalterliche Stadtgesellschaft vom Eigentum her denken”, eds. Pierre Monnet and Otto Gerhard Oexle, *Stadt und Recht im Mittelalter / La ville et le droit au Moyen Âge* (Göttingen, 2003), pp. 167–180.

¹⁶² See Helle Vogt, “‘Likewise Shall no One be Tortured’. The Use of Judicial Torture in Early Modern Denmark” (to be published).

¹⁶³ Vogt, “‘Likewise Shall no One be Tortured’.”

¹⁶⁴ See Jørgensen, *Dansk strafferet fra Reformationen til Danske Lov*. The same tendencies are found in the so-called Farm Law that was valid in royal castles and manors, see Helle Vogt, “Danish Penal Law in the Middle Ages: Cases of Homicide and Wounding”, ed. Stefan Brink, *Scandinavian Provincial Laws—Between Local Customs and European Traditions* (Turnhout, 2011—forthcoming).

ous town laws for Copenhagen because the Newer Town Law of 1443 was significantly more severe than the canonically inspired Town Law of 1294, for example in its use of capital punishment for all instances of killing.¹⁶⁵ Whether this severity, which across the board meant an increased use of physical punishment, had been inspired by foreign example is difficult to decide, but from the middle of the fourteenth century we can assume an increased influence from royal Swedish legislation and penal code in the penal code of Skåne. So the development of the Copenhagen penal law could very well be an expression of the same trend.¹⁶⁶

In other instances, namely in Western Denmark, inspiration came from the German region. This is most visible in the fact that Tønder in Southern Jylland requested and received the Town Law of Lübeck in 1243.¹⁶⁷ Its use was confirmed by Duke Valdemar of Jylland in 1354 when he granted all citizens, merchants and visitors to Tønder the same rights as those enjoyed in Lübeck.¹⁶⁸ The severe penal law that is a well-known feature of the town of Ribe, which is also a part of the region of Southern Jylland, was also inspired by the more severe penal system of the German region.¹⁶⁹ In this connection it is however interesting that Haderslev, which was part of the Duchy of Southern Jylland and therefore had close connections to German culture, employed a less severe penal law, but this may be caused by the fact that Ribe was a royal peculiar in the middle of the Duchy, i.e. that it was the king who took the initiative for the more severe penal code.¹⁷⁰ This finds parallels in the case of Copenhagen, where King Christopher of Bavaria granted the town law in 1443,¹⁷¹ and for example in the Swedish development from the thirteenth century to the Late Middle Ages.¹⁷²

The purpose of the severe penal law was obviously to act as a deterrent and a concrete physical manifestation of the crime committed by the transgressor, while it seems that there was less argument in favour

¹⁶⁵ Jørgensen, *Dansk strafferet fra Reformationen til Danske Lov*, pp. 39–40, 91–100.

¹⁶⁶ Helle Vogt, "Danish Penal Law in the Middle Ages".

¹⁶⁷ DGK I, p. 215.

¹⁶⁸ DGK I, p. 233.

¹⁶⁹ Jørgensen, *Dansk strafferet fra Reformationen til Danske Lov*, pp. 39–40.

¹⁷⁰ Helle Vogt, "Danish Penal Law in the Middle Ages".

¹⁷¹ DGK III, p. 77.

¹⁷² Christine Ekholst, *För varje brottsling ett straff. Foreställningar om kön i de svenska medeltidslagarna* (Stockholm, 2009), pp. 267–279.

of retaliation for the crime behind these punishments.¹⁷³ In addition, it was probably the case that the severity of the laws created coherence for the town inhabitants in their collective retribution on transgressors of commonly held norms.¹⁷⁴ This did not always happen through punishment but also took the form of a conscious socialisation of transgressors.¹⁷⁵ Whatever the reasons for the punishments, there was never in this period in Denmark any attempt to develop a general theory of law, but this was hardly surprising given the fact that there were no significant legal studies.

Summary

The large conurbations that sprung up across the Danish realm during the Early Middle Ages, and in particular in the high-medieval fourteenth century, were (or quickly became) centred around specialised crafts and trades. From one time to another, some of them grew so large that they gained particular privileges to support these trades and crafts, but they could also lose them again if the town lost its significance as a trading centre.

As a consequence of the special role trade played in the boroughs, the wealthier merchants gradually developed into a town patriciate that naturally assumed or—from the beginning of the fifteenth century with royal assistance—were granted a part in the town governance. Merchants presumably originally formed a kind of specialised council to determine disputes concerning trade and it was the members of this council who became town administrators and governors, and together they formed a cooperative town council. From their midst they chose (usually) two people who, sharing the title of mayor, were to act as the spokesmen for the council and externally represent it. The town councils acted, in the main, autonomously until they were subject to the authority of the *lensmænd* in 1561. This transfer of power was

¹⁷³ Jørgensen, *Dansk strafferet fra Reformationen til Danske Lov*, pp. 53–64.

¹⁷⁴ Nicole Gonthier, “Crimes et délits dans le droit urbain d’après quelques exemples de la fin du Moyen Âge (XII^e–XV^e siècles)”, eds. Pierre Monnet and Otto Gerhard Oexle, *Stadt und Recht im Mittelalter / La ville et le droit au Moyen Âge* (Göttingen, 2003), pp. 155–165.

¹⁷⁵ Ulrich Henselmeyer, “Alltagskriminalität und ratsherrliche Gewalt”, eds. Hans Schlosser and Dietmar Willoweit, *Neue Wege strafrechtsgeschichtlicher* (Forschung, Konflikt, Verbrechen und Sanktion in der Gesellschaft Alteuropas. Symposien und Synthesen 2) (Köln, Weimar and Wien, 1999), pp. 155–174.

largely formal and in reality town governance continued more or less as if no change had taken place.

One of the phenomena that were obviously part of the original formation of towns was the *byting*, a parallel to the *herredsting* in the countryside (or maybe even the peculiar courts). It was usually in this forum that the town's legal transactions took place and legal disputes were decided. In a similar development to the local courts and at the behest of the king, the fourteenth century, or at the latest the start of the fifteenth century, saw the introduction of a leader of the court, who later came to represent the interests of the *lensman*. This leader, who usually wielded both sentencing and executive functions, was given the title of *byfoged* in a parallel development to the *herredsting*.

At this time, the town councils made sure that they more or less controlled the legal system of the borough for the council that originally only decided commercial disputes developed into an organ that decided all kinds of financial cases and thus exercised a civil law function. These so-called 'town council courts' (*rådstueretter*) were more powerful than the *byting* because of the leading position of its members and therefore developed a function as the town's appeal courts, which heard decisions passed by the town court. Institutionally speaking, this development follows what we find in German regions, sometimes with a small time lag caused by the fact that towns developed earlier in Germany.

As we have learned from the analysis of the medieval town laws, there were great differences between the towns in terms of procedural law. In the main, the development over time is similar to what we saw in connection with the *herredsting*, namely that the offices and instances such as the *byfoged*, the mayors and the town councils in time squeezed out and replaced, or in some cases supplemented, old ways of deciding legal disputes. In Skåne there seems to have been a particular resistance to this development because the Peculiar Law of Skåne and the subsequent Town Law of Skåne maintained until the end of the Middle Ages that compurgators were more important than jurors, i.e. that they were given a privileged position before the jurors or judges, who were to uncover the truth of a matter.

In many other procedural connections, high- and late-medieval town laws were similar to the provincial laws, but in one particular respect, namely in terms of penal law, the borough laws were clearly more severe than the provincial laws, taking their inspiration from the German town laws and the Swedish town legislation that demanded

more serious punishments. On the other hand, the possibility of using torture as a means of procedure was only introduced quite late in Denmark, for which reason it never gained much prominence, probably because there was never internal unrest to such an extent that the use of such torture was necessary and because there simply was not a profession that could implement this torture.

So the borough legislation found in the town laws was most of all an expression of continuity, both concerning the legal procedure and the penal law since the towns had always applied more serious punishment in cases of transgressions against the law—on the other hand, the socio-economical power structures changed when a town was granted borough rights and thus influenced the legal institutions.

CHAPTER TWELVE

THE ROYAL COURT OF LAW—THE HIGHEST COURT

As already mentioned, thirteenth-century sources mention the ‘king’s *ting*’, but this *ting* did not show its shape and character until the fourteenth century when it developed into an institutionalised royal court of law that could function without the king’s presence. As in the rest of Europe, further development occurred throughout the fifteenth and sixteenth centuries, culminating in the establishment of the Danish Supreme Court (*Højesteret*) in 1661, a year after the introduction of absolutism. In this development Denmark did not differ markedly from other European countries, although the establishment of the royal court of law happened slightly later in Denmark than in most places. However, it is necessary to ask whether the Danish royal court of law had the same importance as comparable courts in other parts of Europe, i.e. whether it was the standard bearer for the implementation of learned procedural law as the royal or imperial court was in France, the Roman-German Empire etc.

Although the Danish royal court of law has already been mentioned several times in previous chapters, I have not dealt with its functions and the way it treated cases, nor have I discussed the kinds of officials and judges who worked there. Thus in this chapter I shall discuss the royal court of law’s practical procedure to investigation; since the royal court of law is the most well-researched court in Danish historiography, I will primarily sum up the results of the investigations by Henrik Lerdam and Ditlev Tamm, who have in depth investigated the periods 1340–1448 and 1537–1660 respectively,¹ and fill out the gaps which may have aroused in the analysis above concerning the ‘king’s *ting*’.

¹ See Lerdam, *Kongen og tinget*, and oversigten in Ditlev Tamm, “Indledning—Kongens retterting 1537–1660”, ed. Ditlev Tamm, *Kongens retterting 1537–1660*, vol. 1 (Copenhagen, 2003), pp. 5–14.

Court and Political Forum

The Danish provincial laws reveal as already mentioned that the king held *ting* in direct competition to the local and provincial courts of the early thirteenth century. The historical sources do not reveal much about the business of this, the 'king's *ting*', but it seems to have functioned as a place for settling 'public' affairs and for recording one's land transactions. Later on, as the king's right to fines increased, the interaction at the royal *ting* probably expanded, too, but the decisive breakthrough came with the social stratification in the last quarter of the century. The social awareness that developed into a fully fledged system of estates during the Middle Ages is first discernible in 1282 when King Eric V Klipping agreed in his *håndfæstning* to hold an annual "parliament called *hof* [court]" with the participation of "the best men of the realm."² In this court, which was later called the Danehof, the king and the major land owing men of the realm engaged in legal activity and also functioned as the highest court of the country so that this now became the forum in which the king defended his legal interests.³ Therefore, it was also often in connection with the Danehof that the royal initiated court met to decide the cases with which it was presented. This court, however, could also meet without the Danehof and it met as an itinerant supreme court until the introduction of absolutism in 1660; during the fourteenth and especially the fifteenth centuries its travels around the realm became less frequent so that it became a court that mostly resided in Copenhagen, and after 1537 this happened in a more institutionalised form as *Kongens Retterting* ('The Royal Court').

With reference to its political-legal side, the last Danehof was convened in 1413, and because of the political circumstances during the fifteenth century it took a long time before there was an equivalent institution. The background to this was the dominance that the aristocratic, land-owning members of the Council of the Realm—which had developed from the gathering of 'the best men' known by the king in person in beginning of the thirteenth century to a more institutionalised council negotiating with the king at the Danehof after

² DD 2:3:45, § 1. For this and later developments mentioned below, see Anna Hude, *Danehoffet og dets Plads i Danmarks Statsforvaltning* (Copenhagen, 1893).

³ See for example DD 2:3:45, § 16 (1282); DD 3:5:32, § 2:9 (1360); DD 4:1:40, § 33 (1376).

1282—gained through their inclusion in the administration of justice because of their innate rights to participate in the decisions of the court after 1413. Thus, the very active Council of the Realm managed to transfer many decisions to commissions and ad hoc courts instead of to the ordinary court, and from the 1430s—when King Eric VII of Pomerania was preoccupied with struggles against Swedes who were critical of the union of the three Nordic kingdoms through the Union of Kalmar founded in 1397—there was an institutionalisation of their activity so that cases were now heard by the king's legal court and council. The increasing power of the Council of the Realm culminated a few years later when it deposed King Eric and called upon his nephew, Christopher III of Bavaria (r. 1439–1448), to become king of the union and at the same time the royal court of law took over the authority of the royal legal courts and for all intents and purposes ceased to refer to the king when making its decisions.⁴ It was also during this period that traditional rules stating that inhabitants in one province could not be summoned outside their province began to be disregarded since such an unusual occurrence happened more and more frequently.⁵

Like his predecessors, Christian I (r. 1448–1481), who succeeded Christopher III, was heavily involved in foreign policy problems and it was only in the reign of *his* successor Hans (r. 1481–1513) that we find a king who was focused on internal policies and who could compete with the Council of the Realm. It is thus during Hans' reign that the first *Herredage* are mentioned in the sources. The period in the fifteenth century during which there were no meetings, no *Danehof* or *Herredage*, meant that the king's sentencing powers appear not to have been exercised under such rigid forms as had happened earlier and was to happen again later at the *Herredage*. Thus, the *Herredage* shared several features with the *Danehof*: like the *Danehof*, the *Herredage* was to assemble once every spring, the date having previously been announced, and like the *Danehof*, the *Herredage* was the highest court of the realm and was conducted mainly in order to administrate justice. However, the *Herredage* was also different from its predecessor, because it was not a common meeting of the nobles but only a meeting for the king and the Council of the Realm, i.e. the most influential magnates of the kingdom. This was the assembly to which the king

⁴ Lerdam, *Kongen og tinget*, pp. 159–171.

⁵ See for example Rep. 1:3:6171 (1425), 6266 and 6267 (1426), 6748 (1438).

had to account after the demise of the Danehof, and which from time to time summoned representatives from other estates in order to come to political agreements.⁶

However, the royal court of law and the Herredage are not identical because the king and the Council of the Realm sometimes announced sentences without the Herredage, just as the Herredage also negotiated political problems, which was an activity that did not take place at the royal court of law. On the other hand, the connection between them was so intimate that contemporary vocabulary does not always distinguish between them.

We can find information in the surviving act books about how often the royal court of law was used from 1537 to 1660, but we do not have a comparable survival of pre-Reformation sources and therefore cannot gain an equally satisfying overview of the pre-Reformation situation. 7,407 sentences dating to the 123 years between the Reformation and the introduction of absolutism survive, which gives us an annual average of 65 royal court of law decisions (if we compensate for missing years).⁷ However, there are marked fluctuations in the sentences passed in the different reigns: during the reign of Christian III (r. 1537–1558), an average of 60 sentences were passed each year—about half of them presided over by the king—but during the reign of Frederick II (r. 1559–1588) there were only 18 annual sentences. This difference can be explained by the fact that the royal court of law had a more orderly structure after the Reformation and that the first year after the Reformation saw a large number of cases (234) that related to the aftermath of the civil war that led to the Reformation. Under subsequent kings, numbers rose steadily so that there were 118 cases in the year before the introduction of absolutism. The varying royal interest in presiding over the royal court of law and the increasing number of cases were almost certainly consequences of the fact that in time the royal court of law developed into an ordinary supreme court for all inhabitants of

⁶ See for example DRL 3:1, § 20 (1513); SDKH, pp. 82–89, § 32 (1536); CCD 1:11, § 30 (1559).

⁷ See the calendar in Tamm, *Kongens retterting*, vol. 2. For a description of the methodology in these tables and their associated problems, see Henningsen, Johansen and Tamm, “16.000 jyske dome”; Johansen and Stevnsborg, “16.900 retssager”, pp. 100–113; Pernille Ulla Knudsen, *Lovkyndighed & vederhæftighed. Sjællandske byfogeder 1682–1801* (Copenhagen, 2001), p. 22.

the realm and not just for the privileged nobles, as was the case until 1590.⁸

Approximately one-half of the cases in the period 1537–1660 dealt with debt and consequent litigation. In other words, the majority of cases were civil suits. Out of the approximately 400 cases that today would be characterised as criminal, sentence was only passed in about 150.⁹ The rest either resulted in acquittal or—which was more common—in a settlement between the parties. The low number of sentences was most likely caused by the fact that the royal court of law was the court to which the nobles owed suit, and for this reason, the losing party was usually able to negotiate a financial settlement or the equivalent. (If indeed it even became a fully fledged court case because often the king appointed an ombudsman or arbiter who attempted to settle disputes before they went to court).¹⁰

In addition to the many sentences, the (almost) annual *Herredage* also composed a substantial body of legislation, particularly after 1558, which was intended to equalise law across the provinces. In addition to this, the central administration passed a number of sentences that created precedents. Indeed several of the sentences could be characterised as legislation in the form of a sentence rather than sentences proper because they formulated new principles or decided how the law should be applied in the future based on the facts of individual cases.¹¹ We do not know of similar practice before 1558.

While the uneven survival of documents means that it is not possible to say how commonly utilised the royal court of law was as a court of first instance or as a court of appeal in the Middle Ages, it is of course entirely different for the period 1537–1660. We learn from the act books that the royal court of law was used as a court of first instance in 3,606 cases (mainly disputes among nobles),¹² while 3,735 cases were appeal cases, of course to the overwhelming part civil suits. Thus, only 12% of the appeal cases were appeals against criminal convictions (of which only about 20% were changed).¹³ Among the 3,735

⁸ Tamm, “Indledning”, pp. 6–9. See for example CCD 1:11, § 27 (1559).

⁹ Tamm and Johansen, “Kongens ting, byens ting og bondens ting”, pp. 76–77.

¹⁰ See for example Miss. 1:68 (1475); Miss. 1:89 and 91 (1478); Miss. 1:282 (1509).

¹¹ Tamm, “Indledning”, pp. 10–11. See for example Da Dom 1:87 (1537), 97 (1542) and 198 (1553), and Da Dom 2:207 (1554). See Tamm and Johansen, “Kongens ting, byens ting og bondens ting”, pp. 79–80.

¹² Tamm, “Indledning”, p. 10.

¹³ Johansen, “Den danske adel og retsvæsenet 1537–1660”, p. 559.

appeal cases the royal court of law was the second court of instance in 1,904 cases, approx. one-half of all the appeal cases, meaning that the case had been decided at a *herredsting* or *birketing* followed by a *landsting* prior to the arrival at the royal court of law.¹⁴ Until around the year 1600, however, only 30% of all cases were appeal cases and for this reason the royal court of law was clearly primarily one amongst several parallel courts during the first period following the Reformation.¹⁵ So we may see an increased hierarchy during the fourteenth, fifteenth and sixteenth centuries, but it was not until the Supreme Court was established in 1661 that this process was completed.

From the act books it is also clear that decisions made by provincial judges were appealed in 2,539 cases, meaning that about one-third of all cases (and two-thirds of the appeal cases) were appeals against decisions passed by provincial judges while approx. 1200 cases were appeals against other first instance decisions. In approx. 90% of appeal cases concerning the *landsting* decisions, i.e. in about 2,300 cases, the provincial judges were supported by the royal court of law so that the decision of the provincial court was confirmed.¹⁶ However, these figures are geographically skewed, for there were substantially more appeals from the courts near Copenhagen, i.e. it is possible to say that it was more likely for a decision to be appealed the closer the decision was made to Copenhagen.¹⁷ The court which as late as the fifteenth century was held “in Greyfriars’ cemetery under the linden tree” or in the hall of the friary in Copenhagen,¹⁸ was increasingly located in Copenhagen, often in the castle, and this played a role for those who considered to appeal. This principle of proximity can also be seen in the small number of third-instance cases, i.e. a case that had gone from a peculiar, local or town court to the provincial court and from thence on to the royal court of law. The relatively small number of such cases indicates that the royal court of law *mutatis mutandis* did not play a

¹⁴ *Kongens retterting* 1, pp. 70–71. The index on p. 271 mentions 3754 references to appeals in these sentences, but this high number is probably caused by the fact that appeals were mentioned in cases that were not appeals. See in addition Tamm and Johansen, “Kongens ting, byens ting og bondens ting”, p. 81.

¹⁵ Tamm, “Indledning”, p. 12, referring to tables 8–10, pp. 70–79.

¹⁶ *Kongens retterting* 1, p. 278, and Tamm, “Indledning”, p. 12.

¹⁷ Tamm and Johansen, “Kongens ting, byens ting og bondens ting”, p. 74; Johansen, “Den danske adel og retsvæsenet 1537–1660”, p. 559.

¹⁸ Rep. 2:1:1194 (1460); Rep. 2:1:1483 and 1553 (1462). See for example also 2:1:1604 (1463).

significant role locally, especially not outside Sjælland: If a case was not appealed, the local community was not informed about the activities and decisions of the court, not even in cases that had immediate significance for the local community. This was a trait that was probably even more pronounced in the Middle Ages.

On the other hand, we can say that if a case was appealed the sentencing judge—in two-thirds of the cases the judge of the provincial court—was summoned before the royal court of law and in connection with this he was given the opportunity to gain knowledge of the sentences passed and possibly collect them together in his private collection of sentences; such private collections is known from the end of the fourteenth century, and it seems to have been a common way of proceeding because where it is possible to identify the owner of such a collection they are either a *lensmand* or a judge.¹⁹ In some cases, however, the king let it be known that a royal sentence was to be published so that in future no one would be disadvantaged by a lack of knowledge of the law.²⁰

One of the ways in which it was possible to become acquainted with the decisions and activities of the royal court of law, locally or regionally, was to attend the meetings of the court when it set out into the realm to meet the inhabitants and to deal with the legal disputes where they occurred. However, it was rare that the court travelled the country, both in the Middle Ages and—especially—later. Jylland saw extended periods with no visitations from the royal court of law, either because the central administration chose not to hold a Herredage or a court session or because the Herredage was held in Copenhagen or in one of the larger boroughs on Sjælland, such as Slagelse or Roskilde, for the sake of convenience. But the cause could also be more concrete, such as the Herredage being cancelled because of epidemics. When this was the case the king could decide that the cases that had been sent to the royal court of law should be decided by the provincial courts, supported by some of the members of the Council of the Realm.²¹ Thus, the royal court of law functioned as, despite the irregular annual meetings, an appeal court for Sjælland—while Jylland in

¹⁹ Tamm and Johansen, "Kongens ting, byens ting og bondens ting", p. 81.

²⁰ For example KB 1550–55, p. 162 (1552).

²¹ For example KB 1576–79, pp. 28 (1576) and 147–148 (1577).

particular was ignored, especially in the earliest and the latest periods, i.e. the fourteenth and the sixteenth centuries.²²

After the Reformation the summons for the mostly annual Herredage and meetings of the royal court of law were to a certain degree standardised. The summons was contained in a public letter issued by the king through his chancery. This letter contained information about the date and venue of the Herredage, which was to be published in all courts, while emphasising that the hierarchy of local, peculiar or town courts followed by provincial courts to the royal court of law must be observed and that any appellant who wished to raise a matter at the royal court of law was to approach the chancery, which would then provide a summons for the correct party or parties. At the same time, the judges that were to attend this royal court of law meeting were informed in private letters and the *lensmænd* were also commanded to read and publish the summons throughout their jurisdiction.²³

Most Danish post-Reformation kings participated in approximately 60% of the decisions that were made by the royal court of law during their period of reign respectively. They participated mainly in the most important cases and in the cases that were heard in Copenhagen or on the island of Sjælland.²⁴ From the Middle Ages it was usual for the king not to participate in meetings when the court was itinerant because these court sessions were often presided over by the chancellor on Sjælland, by the archbishop in Skåne or by the local bishop in Jylland. Thus, the leader—and the rest of the noble participants—changed to include members familiar with the locality in which the court was held.²⁵ In this way it was possible to rest the decision on the provincial law according to the defendant in question *and* to have the decision have some kind of impact on the law in the province where the court took place. Although the royal court of law was increasingly located in Copenhagen in the sixteenth century, this practice of letting people who knew the provincial law and local customs pass the sentences does not seem to have been changed after the Reformation.

²² Lerdam, *Kongen og tinget*, pp. 53–61.

²³ See for example KB 1566–70, p. 160 (1567); KB 1580–83, p. 426 (1582), p. 676 and 680 (1583); KB 1584–88, pp. 436–437 (1586).

²⁴ See for example KB 1580–83, pp. 79–80 (1580) and 250 (1581).

²⁵ Lerdam, *Kongen og tinget*, pp. 91–94, 105–111, 131–136.



Ill. 4. At the top: Scene from the *Kongelige Retterting*, i.e. the royal court of law, in the seventeenth century.

At this time, after 1537, two ‘divisions’ of the royal court of law had developed. One consisted of the king and his council, who together were the supreme court and legislators of the realm. The other was lead by the *rigskansler* (*justitiarius* or *justitiar*, which was a common name for equivalent offices in other European countries) and dealt with the non-payment of fines, i.e. more executive matters.

The office of *rigskansler* originated in the institutionalisation of the royal court of law, which was signified by its use of its own seal from 1341. The introduction of its own seal meant that the royal court of law was no longer dependent on the authority of the king or his chancellor (*cancellarius*) who—since the mid-thirteenth century—was the leader of the royal chancery. Just eight years later, in 1349, the office of *justitiar* was mentioned for the first time. The *justitiar*, who from time to time was also given other titles, was from thence on responsible for letters issued in connection with the activity of the royal court of law, for which reason he was the one who kept the seal of the court and, in addition to that, he also notarised transcripts of court proceedings. He was the head of the secretariat of the royal court of law, but it is clear that he also functioned as a judge equal to the king when he acted as leader of the king’s council and the councillors in the autonomous section of the royal court of law that dealt with the non-payment of fines.²⁶

The *justitiar* was not the only high-level office-holder with such sentencing competences, since from time to time it was emphasised that the chancellor was not to use ‘the great seal’, i.e. the king’s seal, in cases where he was a party, and this may indicate that the chancellor, in some cases, functioned as a judge or a member of a panel of judges in cases of property where he had no interest.²⁷ This is perhaps not surprising because, during the reign of Valdemar IV, the chancellor of the realm was usually a member of the gentry of Sjælland who was most likely paid in land rather than a salary. However, later, during the reign of Eric of Pomerania when the Council of the Realm seriously entered power-politics, the chancellor was usually appointed from among the group of members of the Council.²⁸

²⁶ Lerdam, *Kongen og tinget*, pp. 21–31; Tamm, “Indledning”, p. 10; Tamm and Johansen, “Kongens ting, byens ting og bondens ting”, pp. 78–79.

²⁷ For example DRL 3:1, § 35 (1513); SDKH, pp. 82–89, § 43 (1536); CCD 1:11, § 41 (1559).

²⁸ Olesen, “Middelalderen til 1536”, pp. 30–31; Lerdam, *Kongen og tinget*, pp. 23–31.

This also meant that the position of *justitiar*, which was originally subordinate to the king's chancellor, became equal to the chancellor during the fifteenth century so that the *justitiar* (or more correctly the *rettertingskansler*, 'the chancellor of the royal court of law', as he is called in some sources) could function as a replacement for the chancellor in the conduct of the business of the royal chancellery.²⁹

It is worth mentioning that the members of the council, from among whom the *justitiar* was recruited in the fifteenth century, as a rule did not have a legal education, but only joined the Council of the Realm and the royal court of law because of the manors and land that they owned, which meant that they were some of the most prosperous and therefore most influential political figures of the realm. Because of this, the fifteen to twenty people who made up the Council of the Realm were expected to have a certain amount of experience of government and decision-making.³⁰

Procedure and Trial at the Royal Court of Law

The king could not summon his subjects to the royal court of law if the subject's case was being treated at one of the lesser courts or if the sentence from a lower court was not yet final or described, i.e. taken down on paper. Initially, these rules were introduced as a protection against competition, which the royal court of law could have offered local or provincial courts, but because of considerations of procedural economics it eventually became a demand shared by the central administration, which otherwise risked drowning in cases that had not yet reached a decision at lower courts. From the second part of the sixteenth century, the number of rejections of such cases rose significantly.³¹

As was the case in the lower courts, the royal court of law had particular rules governing how a summons could be issued, and it was doubtless the king's subjects who had a special interest in protecting themselves against abuses in this matter. In a letter issued by Valdemar IV

²⁹ Lerdam, *Kongen og tinget*, pp. 31–35.

³⁰ Tamm and Johansen, "Kongens ting, byens ting og bondens ting", pp. 77–78.

³¹ For this reason the court increasingly rejected cases because they had not yet been heard at *herred*'s or provincial courts, see for example KB 1556–60, p. 194 (1558), 292 (1559) and 460 (1560); KB 1571–75, p. 450 (1574). See also Rep. 2:2:4069 (1477).

in 1360 we learn that there were two stages for summons to the Danehof: due warning and then a legal summons at the local *herredsting*, and that the defendant could refuse to appear if he had good cause (probably the same causes known from the provincial laws in addition to other ones that could be ruled admissible by the king).³²

The number of summonses seems to have followed the practice that was known from the East Danish provincial lawes in which the defendant could be summoned up to four times,³³ and the term within which they had to appear was the traditional six weeks, although in a single instance in 1403 the court demanded that the defendant appear within a fortnight because he had already ignored the previous summonses.³⁴ If a defendant ignored the final summons (and he was unable to prove good cause or let himself be represented by a proxy),³⁵ he was without further proof subject to a sentence as *nederfældig* and thus lost the case³⁶—in some cases, however, the sentence passed was not a final sentence but could be challenged in the future “by better proof”.³⁷ It was not until the sixteenth century that it became possible for the king to impose an additional fine and compensation for sustenance for the opposite party who had appeared before the court as a punishment for ignoring the king’s summons.³⁸ In the same way, an appellant who legally summoned *sandemænd*, jurors or judges who had pronounced a decision at one of the lower courts,³⁹ had to pay their sustenance if they were found to be right—at least this was the rule after the Reformation,⁴⁰ but the thought is very similar to the medieval way of thinking.

The problem of absences must have been common because from the sixteenth century the rules were tightened and adapted time after time.

³² DD 3:5:325, § 2:11 (1360). See the specific example in Rep. 2:3:5956 (1486) recording the fact that a royal summons was ‘broken’ and published. For an acknowledgement that harvesting could be a valid excuse for non-appearance, see FFR p. 353 (1531).

³³ See DD 3:6:17, 20, 23, 26 (1361) and 263 (1362).

³⁴ Rep. 1:3:4576 (1403), see also Rep. 1:3:4540 (1402) and 4552 (1403).

³⁵ For example Rep. 2:3:4491 (1479).

³⁶ For example DD 4:2:637 (1385); Rep. 1:3:7373 (1443); CCD 1:1, § 5 (1558). The same could happen if a party insulted another party in court, see DD 3:5:325, § 2:7 (1360), and DD 4:1:40, § 34 (1376).

³⁷ For example Rep. 2:1:400 (1454).

³⁸ See thus for example DRL 3:13. § 54 (1522); CCD 1:1, § 8 (1558).

³⁹ See for example Rep. 2:2:3982 (1477); Rep. 2:3:5245 and 5253 (1483); CCD 1:1, § 8 (1558).

⁴⁰ See for example SGDL 4, pp. 214–36, § 3 (1547); CCD 1:1, § 5 (1558).

Thus a summons to the royal court of law had to be witnessed and had to be delivered in time for the defendant to appear. If the defendant could not be found the summons had to be read aloud and published three times, with a minimum interval of two days between each reading, at the boundaries of his house and be communicated to as many people as possible.⁴¹ However, it was not until the seventeenth century that the summons to the Herredage were to be delivered at least six weeks before the assembly⁴² and at the same time special assembly days were introduced, depending on where in the country the person summoned lived, so that people from Sjælland and Skåne who were summoned to the Herredage in Copenhagen were to appear on its first day while those from Fyn, Halland, Blekinge, Lolland and the islands were to appear on the fifth day and people from Jylland were to appear on the eighth day.⁴³ These were apparent attempts to streamline the organisation of the Herredage.

When both parties had appeared, the case progressed in more or less the same way as it had done at the local or provincial court. The parties—one of whom was often the local judge⁴⁴ whose sentence was being appealed—presented their pleas and afterwards their proof, which the royal court of law judges could enquire into or study more closely, sometimes by admitting new witnesses.⁴⁵ In some cases this meant that it was necessary to call in *tinghøringer* from lower-level courts (literally ‘court-hearers’, in other words people who had attended previous court sessions as witnesses to its procedure, i.e. such as the *fyllingsmænd* known from Thord’s Articles or similar to the *tingsvidne*) or to send members of the council or *tinghøringer* to obtain further information in the *herredsting* or *landsting* that was implicated.⁴⁶ In other words, the royal court of law investigated the case thoroughly and was more willing to deal with a case for a long period of time than

⁴¹ SGDL 4, pp. 214–36, § 2 (1547); CCD 1:1, § 5 (1558).

⁴² For example CCD 4:567 (1636); CCD 5:143, 2:6, § 8 (1643).

⁴³ For example CCD 5:143, 2:6, § 11 (1643).

⁴⁴ In the beginning of the seventeenth century even the kinsmen of a possibly dead provincial judge could be summoned in appeal instead of the deceased in order to secure some kind of compensation, see Johansen, “Den danske adel og retsvæsenet 1537–1660”, p. 562.

⁴⁵ For example Rep. 1:3:7341 (1443); Rep. 2:1:272 (1453); Rep. 2:1:819 (1458); Rep. 2:4:6507 (1489).

⁴⁶ For example DD 3:4:39 (1353); DD 4:1:266 and 270 (1377); Rep. 2:3:4847 (1481); DRL 3:13, § 66 (1522).

to rush through a fast and dubious decision.⁴⁷ Proof may have been the same as used at lower courts, and although Christian II prohibited the production of witnesses at the royal court of law in his 1522 Land Law—the argument being that the most important witness statements were summarised in the sentences of the lower courts—even in the late seventeenth century witnesses were called before the royal court of law if it was seen as necessary for the conduct of the case.⁴⁸

Of course this also meant that letters and documents became one of the most common methods of proof from around 1500, although the royal court of law doubtless saw its share of forgeries, just as the lower courts did.⁴⁹ There are examples that demonstrate the royal court of law had to provide witness that an old letter of proof had accidentally been torn during the treatment of the case, for which reason it was now the royal court of law's witness that was to be believed.⁵⁰ In the same way, this also meant that summons of—and the very use of—compurgators was extremely rare.⁵¹ An oath of denial was, however, still in use in 1643 in those cases where the judge found that it was necessary in order to follow law and custom, namely when the plaintiff could not prove the guilt of the defendant, but could provide circumstantial evidence because in such cases the defendant was granted the possibility of swearing himself free by the help of oaths.⁵² The same argument is found in canon law's somewhat ambivalent attitude to compurgators in the thirteenth century so, in a manner of speaking, there was little surprising in this.

The letters of protection that the king could provide to protect a culprit who had been sentenced by a lower court and appealed the judgement to the royal court of law could also be used to protect the culprit who promised to abide by the sentence and pay a fine to kinsfolk, creditors, the king, and so on. This became more and more common as the central administration took a more decisive role in the

⁴⁷ For example Rep. 2:1:474 (1455); Rep. 1:3:5475 (1414); Rep. 2:5:9797 (1503); FFR p. 457 (1532).

⁴⁸ See for example KB 1656, p. 52 (1656), in relation to DRL 3:13, § 66 (1522).

⁴⁹ For the later period, see KB 1609–15, pp. 34–35 (1609); KB 1637–39, p. 320 and 491 (1638) and 706 and 714 (1639); KB 1656, p. 21 (1656).

⁵⁰ DKR p. 82 (1539).

⁵¹ However, see KB 1556–60, p. 93 (1557).

⁵² CCD 5:143, 2:6, § 20, with limitations in §§ 21–22 (1643).

administration of justice.⁵³ The implementation of a sentence was still predominantly private, and although it could be enough to make the royal court of law pursue a case, most often concerning real estate, the implementation of a sentence became far more difficult, for which reason cases often stretched out over several years.⁵⁴ But still, seen over the centuries, the king's role as the executor increased and cases often ended with a settlement in order to avoid a royal fine and a subsequent execution by force. In this connection it is telling that during the fourteenth century it was common practice to have a sentence double 'registered' both at the local court and the royal court of law, but after this time it rarely happened at the royal court of law, undoubtedly because the local court provided greater security and was more efficient.⁵⁵

The fact that the royal court of law conducted its business orally and was not interested in arguing the finer points of principles of law made it very efficient, passing quick sentences and producing written documents swiftly.⁵⁶ Post-Reformation it seems that the king acquired a role as the embodiment of the power of sentencing because, even though he may not have been present, he decided a case personally when it was presented to him.⁵⁷ Thus the king did not limit himself to being the deciding vote in cases of parity between councillors (and we can see this from the records of the votes)⁵⁸ because in some cases his vote counteracted the majority. It is also clear from the records of votes that voting started with the most eminent of the members of the council, descending through the hierarchy so that the younger members voted after the older members. Progressing in this manner usually secured consensus about cases, but in a few cases dissent was voiced so that the decision made was that of the majority.⁵⁹

⁵³ For example DD 4:2:255 (1382); KB 1550–55, p. 179 (1552); KB 1550–55, pp. 352–353 (1554); KB 1580–83, p. 492 (1582).

⁵⁴ Lerdam, *Kongen og tinget*, pp. 46–48.

⁵⁵ Lerdam, *Kongen og tinget*, p. 49.

⁵⁶ Tamm, "Indledning", pp. 10–11; Tamm and Johansen, "Kongens ting, byens ting og bondens ting", p. 79.

⁵⁷ Stig Iuul, "Højesterets domspraksis som retskilde. Træk af Højesterets virksomhed inden for privatretten", eds. Povl Bagge, Jep Lauesen Frost and Bernt Hjejle, *Højesteret 1661–1961. Udgivet på Højesterets foranstaltning i trehundredåret for udstedelse af Forordning om den Højeste Rettis administration i Danmark den 14. februar 1661*, 2 vol. (Copenhagen, 1961), here vol. 2, pp. 1–62, esp. 15.

⁵⁸ See Pernille Ulla Knudsen, "Voteringsprotokollerne fra Kongens Retterting 1623–57", ed. Ditlev Tamm, *Kongens retterting 1537–1660*, vol. 1 (Copenhagen, 2003), pp. 25–31.

⁵⁹ Tamm and Johansen, "Kongens ting, byens ting og bondens ting", p. 75. The principle of majority decisions was the common rule for decisions. This is evident

The background to the decisions was often the provincial laws, primarily the Law of Jylland, various statutes and (in particular) the Koldingske Recess of 1558 supplemented by letters patent and previous sentences, so that it was not necessary for the members of the court to possess a comprehensive legal knowledge.⁶⁰ However, it must be admitted that it was rare that the legal foundation for decisions was made clear. This trend was clearly also underpinned by the oral procedure, which was similar to that found in other courts in medieval Denmark—thus it is quite clear that the Danish royal court of law did not have the same significance as most other similar courts in other parts of Europe, i.e. as the entry point for the implementation of learned procedure.

Summary

There are traces of a functioning royal court of law in the thirteenth century when it competed with local and provincial courts in connection with the publication of real-estate transfers and such like. In the following century the royal court of law gained its character as an independent court that heard appeals of earlier decisions, at least in financial disputes between magnates. At this time it was an itinerant court that at various times visited different provinces, often in connection with specific issues such as the restoration of royal crown lands. At a later date the royal court of law became a more regular event because it often took place at the same time and the same place as the Danehof and Herredage where the king met the magnates of the realm, and sometimes the estates, in order to make political decisions, too.

The connection to noble magnates is not coincidental because the royal court of law quickly became the court of first instance for the nobility. It is against this background that financial matters and cases concerning real estate and land were the main business of the royal court of law. From the sixteenth century, when the court became more

from the royally appointed commissions that were regularly constituted to negotiate an agreement or if necessary arbitrate in large property cases. According to a statute of 1596 the president had the casting vote in case of parity, see KB 1593–96, p. 720 (1596).

⁶⁰ Tamm, “Indledning”, pp. 9–10, on the basis of tables 11–14, pp. 80–88.

stationary, holding most of its sessions in Copenhagen or its environs, the court began to function as a court of last appeal in criminal cases and, although there were not many of these, the royal court of law from thence on began to function as a supreme court. When that happened its sentences began to create precedence, although the impact of the sentences locally is unclear while decisions were rarely published. The provincial court was simply closer to the local courts, and since it was mainly here that the penal law was meted out in concrete decisions, it was natural that these regional courts created more significant precedents.

From its foundation, the royal court of law appears to have functioned without the king's presence and this aspect of the court did not change at any time. In the same way, the procedure utilised remained the same, largely similar to the one we see at the local and provincial courts: private suits, the parties' production of proof and the judges' inquisitorial investigation of these. Thus the Danish royal court of law did *not* have the same significance as most similar courts in other parts of Europe that were the entry points for the implementation of learned procedure—on the contrary one can almost say, because there was not much trace of learned law in practice, documentary evidence or in the background of the members of the court.

CONCLUSION PART TWO

LAW AND PRACTICE IN THE LATE MIDDLE AGES

When inquisitorial procedure was introduced by the Catholic Church in 1215, it impacted decisively on the law of proof that had previously been used and promoted in Christian Europe. *Firstly*, the objective proofs, which in and of themselves had decided the case, became obsolete and were replaced with substantial proof, which was intended to decide whether an action causing injury had taken place and, if so, who had caused the injury—the aim was to find the truth of a matter, not ‘just’ to let the plaintiff’s plea and the defendant’s absent proof form the basis of a decision. *Secondly*, institutions for the administration of justice, which were intended to evaluate material proofs and thus establish truth based on an impartial approach to the question of guilt, were established; this was a necessary consequence of the wish to find the truth. *Thirdly*, the burden of proof was reversed and it became the duty of the plaintiff to prove his case, i.e. the defendant was innocent until proven guilty. The purpose was, on the one hand, to ensure the protection of the law so that innocent people were not solely sentenced because of the accusation of the plaintiff and the defendant’s absent proof of innocence and, on the other hand, to limit the number of cases since the change caused a decrease in the number of wrongful accusations and subsequent prosecutions.

The changes in the law of proof had obvious consequences for the kinds of proof that were permitted and most frequently used. By putting emphasis on substantial truth, the formal means of proof such as compurgation, in which a number of nominated compurgators vouchsafed the good standing of the defendant, was undermined and an emphasis was placed on irrefutable proofs concerning the material substance of the case. According to learned law, the most important of these were written documentation or the introduction of such in legal records, confessions and circumstantial evidence of such quality that it could form the basis for a decision. Since the relative weight of circumstantial evidence could be discussed and, almost always, would leave some element of doubt about a decision made on this basis, confession became the desired option because it left no doubt about the

truth of the case and the question of guilt was clearly decided. Therefore, the Church developed means of encouraging confession, both for considerations of equity but also because the transgressor would be better placed at Judgement Day if he or she confessed their sins. Of course one of these means was the methods of interrogation used by the inquisitorial process, which could catch out the defendant in contradictions and thus induce him to relinquish his claim to innocence, and a second means was to impose so much physical discomfort that he or she confessed their guilt—in other words to use torture as a part of the procedure to establish truth. The use of torture as a procedural tool appears in ecclesiastical jurisdiction from the middle of the thirteenth century and from there it extended into several secular legal systems in Europe.

Interestingly, torture never became an integrated part of Danish procedure, which distinguishes Denmark from most other European countries. Torture was used in singular cases as a means of forcing a confession in the sixteenth and seventeenth centuries—possible influenced by Germanic law—but it was only imposed after the case had been decided through ordinary court procedure and after a special permission had been granted by the king. The reasoning in such cases was the same as the one that was formulated by canon law in the thirteenth century, namely that a confession removed all doubt and that torture was for the benefit of the sinner; but the special position that torture thus took in Danish law intimates that both the central administration and the inhabitants of the realm, or at least the magnates, had great confidence in the legal system without its use of judicial torture. Apparently this also meant that it was impossible to be sentenced on the basis of circumstantial evidence, although in practice it was probably difficult to distinguish between circumstantial evidence and the knowledge of local conditions that Danish juries were expected to display.

I have demonstrated in part 1 that Danish procedural law was closely related to the procedural law initiated by the Church in the thirteenth century. The most obvious exceptions to this were the minimal use of torture in Denmark and a (at least not before the end of the eighteenth century) never-completed transference to inquisitorial procedure, in which the judge was also the prosecutor and as such a party to the case on behalf of officialdom. The starting-point was still the medieval accusatory procedure with some inquisitorial features in which there were two parties producing evidence and a jury or a judge evaluating

this evidence. So even though Danish penal law was sharpened after the Reformation, the procedural law continued with 'business as usual' in relation to the procedural law that had been established by the provincial laws.

In terms of the law of proof this meant that the goal to find substantial truth in a case was still what was aimed at. While this is not absolutely clear in all of the provincial laws, it becomes clear in the legal practice that is preserved from the fourteenth century onwards. This did not mean that legal decisions were forced upon the parties: the preferred option seems to have been to induce them to settle the matter or accept arbitration even if a jury had already made a decision. This indicates that local and regional courts preferred a settlement, but it cannot be denied that this may also have been a policy supported by the central administration because it would have meant a better foundation for future peaceful relations between the two parties.

Institutionally speaking, this conservative attitude to procedural law meant that, by and large, the institution of juries, which had been established by the provincial laws, was preserved. The fourteenth and especially the fifteenth centuries saw the introduction of the specific office of judge at the courts, but the judge seems only to have served the function of pronouncing the decision of the jury, at least until the time of the Reformation; during the sixteenth century this changed so that the judge (or the *foged*, i.e., bailiff, as he was called locally) gained increased influence over the decision although he rarely pronounced it on his own. From the end of the sixteenth century the central administration appears to have been tightening its supervision of the courts and therefore we see an increased administrative uniformity, which was given legal foundation in the Danske Lov in 1683. The uniformity was both a consequence of equity and a prerequisite for the system of appeals that took its shape in the institutionalisation of the royal court of law that took place mainly after the Reformation.

With regard to the burden of proof, it was still the plaintiff that had to prove his accusation—in other words the defendant was innocent until proven guilty. As demands for proof became less formal, the defendant was increasingly under pressure to prove his case when proceedings were initiated—at least this is the impression we gain from the increased focus on time limits and timely summons that were repeated in statutes after statutes. It is also clear from the evidence of practice that the most frequent procedural challenges arose around the question of whether a summons had been correctly served.

The Danish restructuring of the law of procedure towards an accusatory form with some inquisitorial traits meant a focus on certain types of proof. According to learned law, written documents and court book entries, confessions or convincing circumstantial evidence with additional confessions forced under torture were necessary, but Danish courts seem to have had a different emphasis, to some extent because a literate culture did not take hold until the fifteenth century and partly because torture was less used as a procedural tool.

In terms of literacy, oral proof in which a fixed number of men testified to what they had seen and heard at a previous court meeting, appears to have had an authority equal to what was written, at least until the beginning of the sixteenth century. This may have been caused by the fact that even in the sixteenth century it was often difficult to find a sufficiently competent scribe locally and, even at that time, there are a number of examples showing that the court scribe did not always properly record evidence and depositions in the correct manner, possibly because of a lack of competence, possibly because of blatant attempts to cheat or distort in order to obscure the truth of the matter.

As regards torture and circumstantial evidence, it is possible that the courts attempted to avoid doubt by focusing on settlements that could be brought about by out-of-court negotiations or arbitration. It is also possible that a medieval jury system, which continued its function throughout the sixteenth century, asserted a certain social control over the relationship between the two parties that supplemented the circumstantial evidence that the parties individually produced in support of their case. If that is the case it seems to be in line with the role assigned to the jurors in several of the provincial laws where on the one hand the jurors must consult with the local community concerning the facts of the case and the judgement to be passed and on the other hand must pass sentence according to what they know to be the truth.

Danish procedural law did not go through extensive radical changes in the period between the composition of the provincial laws in the thirteenth and the post-Reformation legislation of the sixteenth centuries, and such changes were not introduced until the unifying Danske Lov of 1683. After the important changes that had been introduced by the last provincial laws, development was mainly characterised by minor changes, the most extensive of which was the introduction of the judge-like office of *foged* at the local courts, professional judges at

the provincial courts and the institutionalisation of a royal court of law and the development of a system of appeals that was made possible by this. This conservative attitude to procedural law was hardly caused by the fact that Danes paid no attention to what happened outside of the country's borders—the country had a permanent environment conducive to legal study—so we must conclude that the development of Danish law was a conscious choice of whether to adopt or reject the inquisitorial procedure and use of torture which became commonplace in most European countries as a consequence of the spread of the ideology of the *ius commune*.

CONCLUSION

LEGAL PROCEDURE AND PRACTICE
IN MEDIEVAL DENMARK

GENERAL CONCLUSION

This study of the older Danish procedural law consisted of two parts: one concerning the normative procedural law and administration of justice that we find in the medieval provincial laws from the thirteenth century and one concerning their development and legal practice in the period around 1300 to just after the Reformation. My aim has been to investigate how these two periods and these collections of law imagined legal procedure and whether there was an agreement between normative precepts and the way in which procedure was practiced in reality.

The investigation demonstrated that Danish procedural law and administration of justice went through large, radical changes in the first half of the thirteenth century when the Fourth Lateran Council's prohibition against clerical participation in Divine Judgement was implemented and it became necessary to complete a fundamental restructuring of procedural law as well as introducing new institutions in the administration of justice to replace the old law of proof. Danish procedural law thus conformed closely to the law of procedure initiated by the Church in the thirteenth century and replaced, so far as it was possible, formal proof such as hot irons and compurgation with substantial proof intended to decide whether an injurious action had actually taken place and, if that was the case, who was the perpetrator. It now became necessary to find the truth in a matter, not 'just' to let the plaintiff's claim and the defendant's unsuccessful proof form the basis for a decision, and the starting-point thus changed into a situation where the defendant, from the outside, was deemed to be innocent until proven guilty. In order to introduce such an administration of justice, new institutions were necessary to evaluate substantial proof and thus establish truth based on an unprejudiced approach to the question of guilt, and therefore we see the later provincial laws introduce a new institution for the administration of justice, namely juries. Later on, judges supplemented these and published the decisions of the juries or participated in the evaluation of evidence with the juries. Neither the judge nor the juries were given a general power to initiate cases, so the starting-point for the new procedure remained accusatory with two private parties producing evidence, but with the changes of

the thirteenth century inquisitorial traits supplemented the accusatory procedure in connection with the juries' investigation of the questions of fact and of guilt.

Against this background, I must claim that the secular law of the high Middle Ages was, to a very large degree, a living law understood in the way that it was constantly evolving. There was a widespread will to change or supplement current law if that should prove necessary because of experience or a wish to guide developments in a particular direction, and that direction was heavily influenced by learned law in the royally initiated legislation of thirteenth-century Denmark. But changing kings and their jurists did not uncritically adopt the legal institutions or laws known from post-Classical Roman law or contemporary canon law to impose these on their own secular legal order. Thirteenth-century Roman-canon law and the moral ethics of Christianity concerning justice produced a large number of institutional and procedural ideas and tools to allow a secular prince to establish a legal order that could live up to the ideals that were developed in learned law and which sometimes could even support royal power. Thus it provided a tool box from which the prince and his advisors and supporters could take what they needed and, if necessary, transform it so that it fitted into the local framework.

It was this tool box that Danish kings used because the possibility of openly introducing Roman-canonical procedural law and its learned legal institutions (if it was indeed a royal wish to do this) was apparently limited in Denmark. On the one hand the Danish king was not powerful enough to introduce learned law without the support of a regional or local hinterland, and on the other hand there was not a legal tradition in Denmark that could support a blatant implementation of a 'foreign' learned system of law. Therefore, the implementation took place under the cover of old custom that had been rediscovered and was distinguished by the absence of learned terminology—but practice was and remained the important aspect.

Danish procedural law did not see large radical change in the period between the late provincial laws and 1558, or indeed before the streamlining of Danish law of 1683. Following the fundamental changes of the thirteenth century, the development was largely characterised by minor change: most comprehensive was the introduction of judges at local and regional courts and the institutionalisation of the royal court of law, which allowed for the development of a hierarchy of appeals. While procedural law by and large was practised as usual, with the

possible exception of the increased use of written documents, there was a development of the institutions of legal administration, although in practice it is clear that this development was uneven and often contested because of changing power-politics and practical problems in the recruitment of sufficiently able practitioners. With hindsight it is however clear that the central administration worked constantly to secure a certain measure of legal protection and uniformity of the administration of justice. This effort was in the end successful, so that from the second half of the sixteenth century it was possible to implement clearer lines that finally lead to the standardisation of the institutions of legal administration as well as procedural law that was a hallmark of the Danske Lov of 1683.

The conservative traits that characterised Danish procedural law after the significant changes of the thirteenth century does not mean that the Danish development was unique compared to the rest of Europe—there are clearly too many regional variations from all over Europe to form any kind of ideal European model. However, where most other European countries adopted the inquisitorial procedure and additional torture as a procedural step to support the efforts of the courts to compel defendants to confess to their misdeeds in the fifteenth and sixteenth centuries, this never happened in Denmark, not even at the royal court of law and the royal central administration that in other countries were the origin of the inspiration and the demand to implement the learned procedural law of the high and late Middle Ages in its many variants.

Danish conservatism was probably not caused by the fact that Danes did not follow developments outside the realm, so there must have been conscious choices to adapt or reject, possibly caused by a lack of clarity in power-politics that gave local and regional society a large measure of influence. It is clear, however, that where Danish procedural law in the thirteenth century had been a part of the common European way of conceptualizing and implementing the administration of justice—of the European *ius commune*—it remained unusual because of its conservative attachment to tradition in the late Middle Ages, although it was not unique as asserted by many Danish legal historians of the past century.

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